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IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-1079

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY,
*Petitioner*

*v.*

NATIONAL LABOR RELATIONS BOARD
and
SAMUEL E. LONG, INC.,
*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit entered on September 19, 1973, in *National Labor Relations Board, Petitioner, and Samuel E. Long, Inc., Intervenor, v. The Building and Construction Trades Council of Philadelphia and Vicinity.*

## OPINIONS BELOW

The judgment and order of the United States Court of Appeals for the Third Circuit was entered without opinion, and the judgment and order of the court is reprinted in Appendix B, pages A5 to A7, infra. The decision and order of the National Labor Relations Board which is reported at 201 NLRB No. 42, is reprinted in Appendix A, pages A1 to A4, infra.

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 19, 1973. A timely petition for rehearing by the court, en banc, was denied on October 11, 1973. The jurisdiction of this Court is invoked under 28 USC, §1254(1).

## QUESTION PRESENTED

Where a labor organization pickets with the sole objective of persuading a general contractor to execute an agreement under which the only obligation would be, in instances where said contractor decides to subcontract, to subcontract only to firms that have contractual relations with affiliates of Respondent-Union, is such action within the recognitional or organizational objectives in Section 8(b)(7)(C) of the Labor Management Relations Act of 1947, as amended?

## STATEMENT OF THE CASE

### A. *The Factual Background*

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY (hereinafter referred to as "Council") is a labor organization composed of more than seventy (70) affiliated craft unions operating in the five-county area of Philadelphia, Montgomery, Chester, Delaware, and Bucks Counties in the Commonwealth of Pennsylvania. On December 7, 1971, the Council sent a letter to Samuel E. Long, Inc., a general contractor, requesting that Mr. Long sign an agreement relating to the future use of his subcontractors. The agreement was, in effect, that the general contractor, Samuel E. Long, Inc., would in his future jobs, when he subcontracted work to other companies, subcontract work only to those companies who dealt with the Council's affiliated unions. The agreement was not designed to apply to any of Long's employees and merely attempted to regulate in the future what type of subcontractors would be used, when in his discretion, Samuel E. Long, Inc., decided to use subcontractors for any particular craft. The Council never received any response to the letter and on January 24, 1972, it commenced picketing with signs consistent with the purpose set forth in its letter to the general contractor.

As a result of the picketing, the National Labor Relations Board, pursuant to the provisions of Section 10(1) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 160(1), filed a petition for an injunction in the United States District Court for the Eastern District of Pennsylvania, taking the position that the object of the picketing by the Council of Samuel E. Long, Inc. was either recognitional or organizational in its purpose and had continued for more than thirty (30) days and that such picketing was, therefore, in violation of Section 8(b)(7)(C) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 158(b)(7)(C).

After extended hearings and the receipt of briefs and supplemental briefs, the district court refused to grant the requested preliminary injunctive relief under Section 10(1), holding that the theory of law relied on by the regional director in support of his request for injunctive relief under Section 10(1) was erroneous. *Samoff v. Building Trades Council of Philadelphia and Vicinity*, 346 F.Supp. 1071 (E.D. Pa. 1972). The court found that the purposes of the Council's picketing was neither recognitional nor organizational and that, therefore, the regional director had failed to establish the requisite reasonable cause necessary for the issuance of injunctive relief under Section 10(1), by the district court, and that accordingly, injunctive relief was neither just nor proper under the circumstances. A copy of that opinion is reprinted in Appendix D, hereto. (A11-A38)

The regional director of the Fourth Region of the National Labor Relations Board appealed from the decision of the district court to the United States Court of Appeals arguing that its legal theories were correct and that the district court had improperly refused to grant the requested injunctive relief. *Samoff v. Building Trades Council*, 475 F.2d 203 (3rd Cir., 1973). The Third Circuit Court of Appeals did not decide the correctness of the Board's theories of the law, nor did it decide the correctness of the district court's findings on those theories under the facts of the case, but held that the district court had not properly applied the appropriate standards for the granting of injunctive relief under Section 10(1) and that in going beyond those standards, the district court had improperly refused the grant of injunctive relief. The decision of the district court was, therefore, reversed. The opinion and order of the United States Court of Appeals (3rd Circuit) was filed on February 27, 1973, and attorneys for the appellee, The Building and Construction Trades Council of Philadelphia and Vicinity, filed a timely petition for rehearing by the court en banc. The court denied the petition for rehearing on March 27, 1973. A copy of the opinion of the Court of Appeals is reprinted in Appendix E, hereto. (A39-A48)

A timely petition for writ of certiorari was filed with the Supreme Court of the United States at 73-6, to request the review of the decision of the United States Court of Appeals for the Third Circuit discussed above. On October 9, 1973, the Supreme Court of the United States entered an order which granted the petition for writ of certiorari. The Court also ordered that the judgment be vacated and the case remanded to the United States District Court for the Eastern District with directions to dismiss the case as moot. A copy of the order of the court is reprinted as Appendix F, hereto. (A49)

B. *Proceedings Below*

1. National Labor Relations Board

Prior to the decision of the Supreme Court of the United States granting certiorari on the 10(1) aspect of the case, the matter proceeded to a hearing before a National Labor Relations Board trial examiner on the merits, who, on August 29, 1972, issued his decision holding that as a matter of law, picketing for a subcontractors' agreement despite its lack of relationship to the wages, hours, and working conditions of the contractor's employees was, in fact, recognitional picketing and subject to the thirty (30) day limitation of Section 8(b)(7)(C) of the National Labor Relations Act, as amended. The Board affirmed this decision, but rejected the trial examiner's conclusion that certain alleged statements made were not entitled to probative weight and concluded that the picketing was also organizational in nature. A true and correct copy of the decision and order of the National Labor Relations Board is reprinted in Appendix A, hereto. (A1-A6)

2. United States Court of Appeals for the Third Circuit

The National Labor Relations Board then filed with the United States Court of Appeals for the Third Circuit an

application for enforcement of an order of the National Labor Relations Board. A petition to vacate and set aside the order of the National Labor Relations Board was filed by The Building and Construction Trades Council of Philadelphia and Vicinity. After receiving briefs and hearing argument, the Court of Appeals entered a judgment order, without opinion, denying the Petition of The Building and Construction Trades Council of Philadelphia and Vicinity to vacate and set aside the order of the National Labor Relations Board and granted the application by the National Labor Relations Board for the enforcement of its order. The judgment and order of the Court of Appeals was entered on September 19, 1973. The Building and Construction Trades Council of Philadelphia and Vicinity filed a timely petition for rehearing by the court en banc. The court denied the petition for rehearing on October 11, 1973. A true and correct copy of the court's judgment and order and notice of the denial of the petition for rehearing are reprinted in Appendix B, hereto. (A7-A9)

## REASONS FOR GRANTING THE WRIT

**I. The decision below conflicts with the decisions of other courts of appeal, other United States district courts, and with other decisions of the National Labor Relations Board in its upholding of the decision of the NLRB finding of violation of Section 8(b)(7)(C) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 158(b)(7)(C), where a labor organization pickets with the sole objective of obtaining the sub-contractor's agreement.**

Section 8(b)(7)(c) of the National Labor Relations Act of 1947, as amended, 29 U.S.C. 158(b)(7), established a code for the governing of recognitional and organizational picketing and enacted the wishes and intent of Congress to encourage prompt resort to the election machinery rather than protracted picketing as the method for resolving representation questions. Sub-paragraph (C) of that Section, involved herein, notes, *inter alia*, that, under certain circumstances, it shall be an unfair labor practice for a Union to picket an employer where an object is to force the employer to recognize or bargain with the Union ". . . as the representative of his employees . . ." . The issue which was before the National Labor Relations Board in this case and before the court below in the proceedings before it to enforce the order of the Board involved, therefore, a determination as to whether or not the picketing engaged in by petitioner, The Building and Construction Trades Council of Philadelphia and Vicinity, had a recognitional or organizational object which would have caused the violation of sub-paragraph (C) because of the failure of the petitioner to adhere to the requirements of that subparagraph, i.e. the necessity of filing a representation petition where the picketing has been conducted for a "reasonable period of time" not to exceed thirty (30) days. Despite the fact that the record for the NLRB fails to substantiate the Board's contention that the objective of the

picketing of the petitioner was organizational or recognitional, (it is substantially undisputed that the limited scope of the objective of the petitioner in its picketing was to achieve a sub-contractor's agreement which did not affect anything other than the identity of sub-contractors to whom the general contractor, Samuel E. Long, Inc., could contract work when in his discretion he decided to do so) the court below granted enforcement to the order of the National Labor Relations Board, which found that the object of the picketing was, in fact, organizational or recognitional, and, therefore, in violation of Section 8(b)(7)(C) of the Act. The judgment of the Court of Appeals was without opinion and merely cites the case of *Dallas Building Trades Council v. NLRB*, 396 F.2d 677 (D.C. Cir., 1968). This was done even though the said *Dallas* case involved a distinguishable situation from the case at bar in which a different provision (Section 8(b)(7)(A)) of the Act was at issue and despite the fact that their decision conflicts with the judgments of other circuit courts of appeal, United States district courts, and other decisions of the National Labor Relations Board that the objective of picketing for a sub-contractor's agreement is not *per se* picketing for an organizational or recognitional purpose, and therefore, not violative of Section 8(b)(7)(C) of the Act if pursued for more than thirty (30) days without the filing of a representation hearing pursuant to Section 9(c) of the Act.

In fact, the decision of the Third Circuit Court of Appeals, in this case, directly conflicts with the holding and rationale of a prior decision of the Court of Appeals for the Third Circuit, in the case of *Essex County District Council v. NLRB*, 332 F.2d 636 (Third Cir., 1964). While that case dealt with alleged violations of Section 8(b)(4)(b) and 8(b)(4)(a) which prohibit picketing which has as an object the requiring of an employer to enter into an agreement which is prohibited by sub-section (e) of Section 8 of the Act, or of requiring or forcing any person to cease dealing with the products of any other person or to cease doing business with any other person, it is submitted that the

rationales of that case uphold the right of the petitioner to picket for a sub-contractor's agreement without a finding of an objective which would bring it in violation of Section 8(b)(7)(C) of the Act. The court in the *Essex* case held that the NLRB's position that picketing to obtain a sub-contractor's agreement, constituted a violation of Section 8(b)(4)-(b) or 8(b)(4)(a), was clearly erroneous and that there was nothing in the Act which prevented the resort to an otherwise specifically proscribed activity as a means to obtain a clause (i.e. subcontractor's agreement) otherwise legal under sub-section 8(e). The court recognized that the rights contained in Section 8(e) required the application of that sub-section as a basis for negating a finding of a violation under 8(b)(4)(a). Agreements relating to sub-contracts for work to be performed at the construction site, and therefore, picketing activity otherwise illegal, may therefore, be employed to obtain such a contract. A review of the case at bar indicates that the Board has attempted to rely on similar rationale in its finding of a violation in the case at bar under Section 8(b)(7)(C), and such rationale is directly contra to the holding in the *Essex County* case, *supra.*

A similar finding to that of the *Essex case, supra.*, was made by the United States Court of Appeals for the Ninth Circuit which dealt again with the application of the exclusion set forth under Section 8(e) on the charge of an alleged violation of Section 8(b)(4)(a), and 8(b)(4)(b); *Construction, Production, and Maintenance Laborers Union, Local Union 383, AFL-CIO v. NLRB*, 323 F.2d 422 (Ninth Cir., 1963). The court, in that case, specifically held that picketing to secure a sub-contractor's agreement, which is specifically excluded as a violation under Section 8(e) of the Act, was not illegal and not a violation of either Section 8(b)(4)(a) or 8(b)(4)(b). Again the rationale used by the Board in that case was similar to that employed in the case at bar and the reliance on that rationale is in direct conflict with the decision in the *Construction, Production and Maintenance Laborers Union, Local Union 383 , supra.*

Numerous district courts have reached the same holding as that of the circuits cited above in that picketing with the object of securing a sub-contractor's agreement, is not a violation of Section 8(b)(4)(a) or 8(b)(4)(b) of the Act. See *Cuneo v. International Union of Operating Engineers, Local No. 825*, 216 F.Supp. 173 (N.J. 1963); *Lebus v. Local No. 60, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO*, 193 F.Supp. 392 (Eastern Dist. of Louisiana, 1961). There can be no question but that the law is clear that this type of picketing is not a violation of Section 8(b)(4)(a) or 8(b)(4)(b) of the Act and in fact, the Board finally became convinced that its construction of the law was in error, and accordingly, altered its position; *Building Trades Council of Orange County*, 157 NLRB 375 (1966). However, the Board continues to have difficulties in placing the rights guaranteed under Section 8(e) of the Act in proper prospective and by utilizing similar rationale as that of its prior arguments in the cases arising under Sections 8(b)(4)(a) and 8(b)(4)(b), in its finding of violations resulting from similar conduct under Section 8(b)(7)(C), brings the Board and the court below in direct conflict with the cases cited above.

Another area where the rationale of the National Labor Relations Board of finding of violation in the instant case, is in conflict with the decisions of other federal courts, involves the controversy arising in cases concerning area standards picketing , in which a labor organization seeks to compel an employer to confer upon his employees wages and/or working conditions similar to those enjoyed by union members in the area. These cases deal with alleged violations of Section 8(b)(7)(C) where the courts found that a union, which is legitimately concerned that a particular employer is undermining areas standards, may be willing to forego recognition in bargaining provided that subnormal working conditions are eliminated from the area. These decisions restricted the definition of organizational and recognitional picketing which the Board and the

court below attempt to extend in the case at bar by holding that the prohibited organizational object found in Section 8(b)(7)(C) cannot be inferred from areas standard picketing itself. In these cases, the courts were unable to find the prohibited organizational and recognitional object, and therefore, refused to find violations of Section 8(b)(7)(C) where the picketing continued for more than thirty (30) days without the filing of a petition for representation.

In the *Sachs v. Plumbers Local Union No. 5*, 307 F. Supp. 190, 72 LRRM 2900 (D.C., 1969), the Board took the position that the Union's intent to engage in organizational or recognitional objectives could be inferred from the act of the picketing itself. The Board, in that case, relied on four cases for its proposition that such an inference should be drawn in such a case where the area standards sought to be upheld is the union wage rate, including the two cases relied on by the Board in the instant case and by the Circuit Court of appeals for the Third Circuit, i.e. *Dallas Building and Construction Trades Council v. NLRB*, 396 F.2d 677 (1968), and *Centralia Building and Construction Trades Council v. NLRB*, 363 F.2d 699 (1966). The court in the *Sachs* case, *supra.*, distinguished the decision in *Dallas and Centralia* and found that the picketing did not have an organizational or recognitional object, and therefore, could not be proscribed under Section 8(b)(7)(C) of the Act. The court stated:

> "It is the opinion of the Court that the Petitioner has made an insufficient showing of reasonable cause to believe that a violation of the Act has occurred. No evidence other than the picketing itself, the exchange of correspondence between the Union and Johnson, and the casual attempt to enlist Johnson employees in the Union, has been introduced to support the allegation of recognitional or organizational purpose. This is not sufficient to justify the granting of an injunction against the Union's activity. There is no question that area standards picketing directed against non-Union employers is a legitimate Union Activity.

*Centralia Building and Construction Trades Council v. NLRB, supra.* There has been no proof that the Union's sole purpose in the picketing was not the legitimate one of informing the public that Johnson was paying sub-standard wages in the hope of forcing Johnson to pay its plumber employees compensation equal in cost to the Union rate."

*Sachs v. Plumbers Local Union No. 5., supra.* See also *Lebus v. Building and Construction Trades Council of New Orleans and Vicinity, AFL-CIO*, 199 F.Supp. 628 (Eastern District of Louisiana, 1961).

The Board has also similarly held that such area standards picketing is not violative of Section 8(b)(7)(C). *Houston Building and Construction Trades Council (Claude Everett Construction Company)*, 136 NLRB No. 28 (1962). In that case, charges had been brought alleging violation of Section 8(b)(7)(C) of the Act, stating that picketing with the prescribed objective of forcing recognition or bargaining lasted in excess of thirty (30) days without a petition for representation having been filed. The Board, however, disagreed with that contention and stated:

> "While the *Calumet Contractors* case (relied on by the Board in the case now being discussed) arose under Section 8(b)(4)(C) of the Act, which prohibits only recognitional picketing, whereas the instant case arose under Section 8(b)(7)(C), which proscribes both recognitional and organizational picketing, the language of both sections are similar, and the rationale in that case is equally applicable herein. The Respondent in the present case did not, in its conversation with the Company, its letter to the Company, or its picket signs claim to represent the Company's employees, request recognition by the Company, or solicit employees of the Company to become members of any of the locals which are members of the Respondent. Moreover, the undisputed testimony of Executive Secretary Graham reveals that the Respondent Union

> has on numerous occasions in the past made similar protests against sub-standard wages paid by other employers without ever requesting recognition as the bargaining representative of their employees. Thus, it is clear from the entire record, that the objective of the Respondent's picketing was to induce the Company to raise its wage rates to the Union's scale prevailing in the area. We cannot, as do our dissenting colleagues, equate this attempt to maintain area wage standards with the conduct 'forcing or requiring an employer to recognize or bargain with the labor organization as the representative of its employees, or forcing or requiring the employees . . . to accept or select such labor organization as their collective bargaining representative', the conduct proscribed by Section 8(b)(7)."

The rationale utilized by the Board in attacking area standards picketing in attempting to find organizational or recognitional objects of that picketing is substantially similar to the rationale utilized by the Board, in this case, in attempting to attach the same proscribed objectives to the picketing for the sub-contractor's agreement in the case at bar. Such rationale has been specifically rejected by the federal courts and the NLRB in the cases dealing with the area standards picketing and the attempt to utilize substantially the same rationale in the cases involving picketing for sub-contractor's agreements is, in fact, a direct conflict with the decision of those cases.

Significantly, the decision of the court below in this case, is in direct conflict with the decision of the federal district court in the related Section 10(1) proceedings. *Samoff v. Building Trades Council*, 346 F.Supp. 1071 (E.D. Pa. 1972). The record before the district court was substantially the same as that before the Board and before the court below, and because of the conclusion by the district court in the 10(1) proceeding that it was obliged to resolve whether the position of the NLRB was, in fact, correct, that

court in its opinion presented a scholarly, in-depth review of the question of whether the picketing for a sub-contractor's agreement in this case had the proscribed organizational or recognitional objectives and the resultant impact of Section 8(b)(7)(C) on that picketing. The district court distinguished the holdings of the *Dallas Building Trades Council* case, *supra.*, and the related cases and found that the picketing, in the case at bar, to secure a sub-contractor's agreement, did not have the proscribed recognitional or organizational objectives, and that therefore, there could be no resultant violation of Section 8(b)(7)(C).[1]

The most striking conflict with the decision below and the NLRB, in this case, can be found in prior decisions of the Board where the same issue has been broached and where there have been findings that sub-contractor picketing, in those cases, did not have the proscribed objective and was not, therefore, violative of Section 8(b)(7)(C) of the Act. See, *Winwake, Inc.*, 141 NLRB 38 (1962); *Pass Development, Inc.*, 154 NLRB 169 (1965). These cases principally center around Section 8(b)(4) charges against the unions and councils involved because they were attempting to force the general contractor to cease doing business with non-union sub-contractors who were on a construction job in progress so as to "correct a non-union condition." However, the auxiliary purpose of the picketing in each case was to persuade the general contractors involved to hire union sub-contractors. Both cases, therefore, dealt with

1. United States Court of Appeals for the Third Circuit reviewed the decision of the district court cited above, but their holding dealt only with the standard applied by the district court in denying the Section 10(1) injunction. The Third Circuit Court of Appeals did not, at that time, reach a determination of whether the construction of 8(b)(7) urged by the Union and adopted by the district court was correct. *Samoff v. Building Trades Council*, 475 F.2d 203. The Supreme Court of the United States, granted certiorari to review this decision of the Court of Appeals, vacated the judgment of the Third Circuit and remanded the case back to the U.S.D.C. for the Eastern District of Pennsylvania with directions to dismiss the case as moot.

sub-contractor picketing and the Board held in both instances that the Councils' actions did not violate Section 8(b)(7)(C) of the Act.

In *Winwake, Inc., supra.*, the Board dismissed Section 8(b)(7)(C) charges against the union. The Board adopted the findings, conclusions, and recommendations of the trial examiner who held that the union's purpose in picketing was not recognitional but merely to force or require the general contractor to put the non-union sub-contractors off the job, and replace them with union contractors.

The trial examiner in *Winwake, Inc., supra.*, at page 50, summarized this conclusion with regard to the Section 8(b)(7)(C) charge as follows:

> "Upon the record in this case, I cannot accept the General Counsel's contention that the Council's picketing had, among others, the recognitional or organizational objectives forbidden by Section 8(b)(7)(C). The Council at no time sought recognition of any of the sub-contractors and, aside from the picketing, had no communications whatever with the non-union sub-contractors. The Council's practice in situations like the present, according to Deady's credited testimony, was not to approach the non-Union sub-contractors at all, but rather to approach the general contractor whose award policy was unfavorable to the Council, and attempt to persuade him to change his award policy so as to give sub-contracts to employers who customarily used Union men. This was the procedure followed by Deady in this case. In my opinion, the record fails to sustain the General Counsel's position that an objective of the picketing was to force the sub-contractors to recognize the Council or to force the employees of the sub-contractors to accept the Council or its affiliated labor organizations as the bargaining representative of their employees. Rather, the Council by its picketing was seeking to force or require *Winwake* to put the non-union sub-contractors off the job

entirely and replace them with Union sub-contractors. While, as found above, picketing for such an objective falls within the ban of Section 8(b)(4)(b) of the Act, in my opinion it does not come within the prohibition of Section 8(b)(7)(C) under the circumstances of this case. Accordingly, the Section 8(b)(7)(C) allegations of the Complaint will be dismissed."

Together, the *Winwake* case and the *Pass* case, *supra*, stand for the proposition that picketing which is sub-contractor oriented, is not proscribed by Section 8(b)(7). A review of the *Dallas* case, *supra*, which the Board puts forth as rendering the decisions in *Winwake* and *Pass Development*, *supra*., obsolete, clearly demonstrates a readily distinguishable, factual situation from that of the case at bar, and from that of the *Winwake* and *Pass* cases which are very similar in their factual backgrounds to the case at bar. Therefore, it is untenable to maintain as the Board did in the court below, that *Dallas*, *supra*, in any way affects or overrules the decision of the Board in these two cases.

There is clearly a conflict among the courts and the NLRB in the application of the rationales dealing with the picketing of labor organizations pursuant to the rights granted them under Section 8(e) of the Act. As has been shown, there has been considerable confusion among the courts and the Board as to the correct interpretation of the picketing rights under Section 8(e), and the effect of such picketing with regard to those rights in establishing violation of Sections 8(b)(4) and 8(b)(7) of the Act.

Additionally, conflicts can be seen to exist in the attempts by the courts and the Board to determine whether the proscribed organizational or recognitional objectives are present which would otherwise make proper picketing violative of the Act and illegal. These conflicts directly affect the case at bar, particularly since the decision in the *Dallas Building Trades Council* case, *supra*., relied on by the court below, involved a factual situation distinguishable from that of the case at bar, and also involved a finding of

a violation under a different section of the Act. That case, however, in conjunction with the conflicting rationales discussed above, forms the basis for the decision of the Board and the court below in this case. Under such circumstances, there is clear justification for the grant of certiorari to review the judgment below.

## II. The decision below raises significant and recurring problems concerning the interpretation and application of Sections 8(e) and 8(b)(7) of the National Labor Management Relations Act of 1947, as amended.

The instant case is of extreme importance in the field of labor law in that it is the first decision by any court that picketing for a sub-contractor's agreement, whether or not the picketing organization neither had nor seeks a direct or indirect relationship to the picketed party's employees, comes within the control of Section 8(b)(7)(C) of the Act. The thrust of the decision of the NLRB, as enforced by the court below, is that any picketing to secure a sub-contractor's agreement involved a condition of employment and is, therefore, consequently recognitional or organizational in its scope. Such a result, which is in direct conflict with the construction industry proviso of Section 8(e) of the Act, would have a devastating effect on labor relations within the construction industry.

Picketing for a sub-contractor's agreement is specifically protected by the construction industry proviso of Section 8(e) which was part of the 1959 amendment to the Act.[2]

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2. Section 8(e) provides in relevant part as follows: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *provided that*

The Supreme Court of the United States in *National Woodworker Manufacturer's Association v. NLRB*, 386 U.S. 612, 619-620 (1967), noted that the construction industry proviso was intended to preserve the status quo with regard to "hot cargo" agreements in the construction industry.

Prior to the 1959 amendments to the Act, picketing, such as that engaged herein, was not unlawful under the Act. Since 1959, the courts have repeatedly refused to find construction site picketing to achieve a sub-contractor's agreement in violation of Section 8(b)(4), 29 U.S.C.A. 158 (b)(4) as discussed above. See *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB, supra; Sachs v. Plumbers Union Local No. 5, supra; Orange Belt District Council of Painters, 48 AFL-CIO, et al. v. NLRB*, 328 F.2d 534 (D.C. Cir., 1963); *Laborers Union Local 383 v. NLRB*, 323 F.2d 422 (9th Cir., 1963).

In the *Essex County* case, *supra.*, the Third Circuit Court of Appeals, as discussed in the preceding section held that that picketing for a sub-contractor's agreement was protected under Section 8(e). In referring to the construction industry proviso at page 641, the court stated in broad language as follows:

> "There is nothing in the language of the Statute from which it may be inferred that it was the congressional intent to restrict the exemption to voluntary contracts. The critical phrase in the proviso reads as follows: 'Nothing in this sub-section shall apply to An Agreement.' (emphasis added). If it had been the intent of Congress to limit the application of the proviso, it could have manifested this intent simply by substituting the qualifying words 'a voluntary' for the indefinite article 'an'."

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*nothing in this sub-section (e) shall apply to an agreement between a labor organization and an employer in the construction industry and leading to the contracting or sub-contracting of work to be done at the cite of the construction, alteration, painting, or repair of a building, structure, or other work."* (emphasis added.)

There is also nothing in the language of the construction industry proviso which precludes its application to the instant case. The courts' holding that picketing may be employed to achieve sub-contractor's agreements are equally applicable herein.

Section 8(b)(7) and Section 8(e) amendments were passed by Congress at the same time. No doubt Congress recognized that in many cases, the most effective means and in some cases the only means of achieving a sub-contractor's agreement was through the use of picketing. The courts have repeatedly held that in passing Section 8(e), Congress clearly sanctioned the use of other than voluntary means to obtain sub-contractor's agreements. Congress' intent in adopting Section 8(e) was to preserve the status quo with regard to hot cargo agreements in the construction industry. Section 8(e) and 8(b)(7) must be read in conjunction so as to effectuate the overall congressional scheme and intent. Absent clear legislative history to the contrary, it would be inappropriate to hold, in effect, that Congress intended to emasculate its objective with regard to the construction industry proviso when it adopted Section 8(b)(7).

Accordingly, it must be held that the proviso in Section 8(e) protects the picketing herein and that the construction industry proviso is a limitation upon the applicability of the terms of Section 8(b)(7). The record for the court below, taken as a whole, fails to establish any organizational or recognitional objective other than what the court attempts to establish out of the picketing for the sub-contractor's agreement *per se*. Such a holding, therefore, as the one below, which ignores the required limitations on the applicability of Section 8(b)(7), clearly is in conflict with and violates the overall statutory intent and scheme of Sections 8(e) and 8(b)(7) of the Act.

The court below in upholding the decision of the Board creates an additional untenable conflict with the Act in that it accepts the Board's theory that coercive action by a labor organization looking towards a contract to secure

a sub-contractor's agreement must be deemed to be recognitional in character for Section 8(b)(7)(C) purposes regardless of whether the labor organization seeks to become the collective bargaining agent of those employees.

The legislative history of Section 8(b)(7)(C) makes it clear that this section was principally directed to "blackmail picketing" or picketing by a union to achieve exclusive representation without a majority showing of interest. In enacting this section, Congress wished to encourage prompt resort to the election machinery rather than protracted picketing, as the method for resolving representation questions.

The Board in the case of *Charles A. Blinney, d/b/a C.A. Blinney Construction Company*, 135 NLRB 1153 (1962) states the following in construing Section 8(b)(7)(C):

> "The intent of sub-paragraphs (A) and (B) is fairly clear. Congress concluded that where a Union has been lawfully recognized and a question concerning representation cannot appropriately be raised, or where the employees within the preceding twelve (12) months have made known their views concerning representation, both the employer and the employee are entitled to immunity from recognition or organization picketing for proscribed periods.
>
> Congress did not stop there, however. Deeply concerned with other abuses, most particularly 'blackmail picketing,' Congress concluded that it would be salutary to impose even further limitations on picketing for recognitional organization. Accordingly, subparagraph (C) provides that even where such picketing is not barred by the provisions of (A) or (B) so that picketing for recognition or organization would otherwise be permissable, such picketing is limited to a reasonable period not to exceed thirty (30) days unless a Representation Petition is filed prior to the expiration of that period. Absent the filing of such a timely petition, continuation of the picketing beyond the

reasonable period becomes an unfair labor practice. On the other hand, the filing of a timely petition stays the limitation and picketing may continue pending the processing of the petition. Even here, Congress, by the addition of the first proviso to subparagraph (C), made it possible to foreshorten the period of permissable picketing *by directing the holding of an expedited election pursuant to the Representation Petition.*" (Footnotes omitted, emphasis added).

It is clear, therefore, that a violation of Section 8(b)-(7)(C) occurs only where picketing has been conducted for a reasonable time, not to exceed thirty (30) days, without the filing of a petition under Section 9(c). It must be noted, however, that representation petitions under Section 9(c), lead to representation elections and are filed only by labor organizations who have entered into efforts to organize employees and who seek recognition as their collective bargaining agent. There is no provision in the procedures and policies established by the Act and implemented by the Board for employees to select a representative to bargain for them on one subject, such as sub-contracting.

The legislative history and the Board's construction of Section 8(b)(7)(C) as set forth in *Blinney, supra.*, definitely established that the sole purpose of Section 8(b)-(7)(C), is to restrict picketing which has as its objective, the organization of employees by a labor organization and recognition of that labor organization as the full collective bargaining agent of those employees. Section 9(c) clearly presupposes an exclusive bargaining agent concept and anything less than that, such as in the case at bar, would not fit within the legislative scheme of Section 9(c) certification petitions. Clearly, then, if Congress had meant to proscribe picketing by Section 8(b)(7)(C) other than for the purposes of organization and recognition in the conventional sense (i.e., to organize employees and compel the employer to recognize the Union as their bargaining agent),

it would not have tied Section 8(b)(7)(C) violations to a failure to file a 9(c) representation petition which leads to a Board supervised election; *Samoff v. Building Trades Council of Philadelphia and Vicinity*, 346 F.Supp. 1071 (E.D. Pa., 1972).

In its introductory portion concerning the prohibited objections, Section 8(b)(7) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C.A. 151, et seq; 73 Stat. 519, notes that it shall be an unfair labor practice for a union to picket an employer where the object is to force the employer to recognize or bargain with the Union "... *as the representative of his employees* ..." (emphasis added). Obviously, the prohibitions speaks to the status of the exclusive bargaining agent which is the theme running throughout the entire Act. It is clear that the term recognition contained in Section 8(b)(7), is the recognition of the union as the exclusive bargaining agent of the employees of the charging party, and the term organization is the organization of those employees into membership into that particular Union (See *Conference on Labor*, 13th Annual New York University Proceedings, page 185, et seq. (1960); see also Van Arkel, *Picketing under the 1959 Amendments*, 13th Annual New York University Conference on Labor, page 201 (1960)). As noted by Senator Ervin:

> "Recognition picketing is picketing which is designed to *compel the employer to accept the Union as the bargaining agent for the employees*, regardless of whether the Union represents a majority of the employees." (emphasis added). 105 Cong. Rec. 5960 II, 1959 Leg. Hist. 1183.

Under the rationale which appears in such cases as *Blinney, supra.*, and in the legislative history of the Act, it is impossible to reconcile the stated purpose and provisions of Section 8(b)(7) with the present contention of the Board. The charging party's employees are non-union. The object of the sub-contractor's agreement and its contents do not change that status. The charging party's employees

are paid wages and benefits dictated by him—the sub-contractor's agreement does not change that condition. The charging party retains the right to decide what work he will contract out to sub-contractors and when he will do so. The sub-contractor's agreement does not change that condition. There is nothing which in any way establishes an attempt by the Council to become *the* bargaining agent for the employees of the employer. Failure of the court below and the Board to recognize or make this distinction places the decision of the court in direct conflict with the legislative intent and statutory scheme of the Act and raises an insurmountable question as to the viability of that decision.

The novelty of this proposition which has been sustained by the court below; the obvious conflict which the rationale behind that decision has with the terms of the Act itself; and the monumental impact which the enforcement of that decision will have on the construction industry, requires the granting of certiorari to review the judgment of the Third Circuit and the establishment of controlling guidelines by the Supreme Court for picketing to secure sub-contractor's agreements within the construction industry.

## III. The decision below incorrectly interprets and applies Sections 8(e) and 8(b)(7) of the National Labor Relations Act of 1947, as amended, and is, therefore, erroneous.

As has been previously discussed, the court erred in its interpretation and application of the Sections of the Labor Management Relations Act, as amended, which it relied upon in bringing charges against the petitioner. Additionally, the decision of the Board and the court below is erroneous because of its reliance on the *Dallas Building and Construction Trades Council* case, *supra.*, which is clearly distinguishable from the case at bar. In the *Dallas* case, *supra.*, the contractor's employees were represented by individual craft unions which were affiliates of the Respondent-Council. They had made as an area of collec-

tive bargaining the question of sub-contracting and there had been give and take or contractual working conditions and the issue of sub-contracting. Importantly, *Dallas, supra.*, was decided under Section 8(b)(7)(A) and not 8(b)(7)(C). Moreover, it was decided upon what, as the district court in the related 10(1) proceedings indicated, would seem to be a special response to a unique situation. The same observation is true of the decision in *Lane-Coos-Curry-Douglas Counties Building Trades Council v. NLRB*, 415 F.2d 656 (C.A. 9, 1969). In that case, which by a two-to-one panel decided to follow *Dallas*, the court noted (at 659):

> "The Board further finds that several of the provisions of the proposed contract related to subjects already covered by the collective bargaining agreement between Chambers and Locals of the Laborers and Carpenters Unions, and would have modified the terms of the latter agreements."

Despite this significant difference in cases, it would seem nevertheless that the dissent in *Lane-Coos, supra.*, is the better reasoned of the two opinions.

In the final analysis, *Dallas, supra.*, drew its support from the case of *Centralia Building Trades Council v. NLRB*, 363 F.2d 699 (C.A. D.C. 1966). That case did not involve a subcontractor's agreement, but solely involved picketing for area wage standards and a proposed agreement to observe those standards. In *Centralia*, however, since an agreement requested by the Respondent-Union covered wages and benefits of the charging party's employees and a host of administrative procedures normally found in a labor contract, the trial examiner, the Board and the court concluded that there would be nothing left for a collective bargaining agent to negotiate, and that, accordingly:

> ". . . an object of the picketing was to force or require Pacific to recognize the Petitioner as *the* rep-

resentative of Pacific's employees." (emphasis added; 363 F.2d 699 at 701).

The decision in that case must be limited, therefore, to a holding that the extent to which the picketing organization is seeking to assume normal collective bargaining functions with regard to an employer's employees, is determinative of whether the picketing has a lawful or unlawful objective under Section 8(b)(7). *Centralia, supra.*, is clearly distinguishable therefore, from the case at bar because of the relatively small effect, if any, that the sub-contracting agreement sought here would have on the ability of Long's employees to engage in the full scope of normal bargaining functions with a chosen bargaining representative.

Furthermore, even though the *Dallas* Court appears to be extending the *Centralia* rule, *Dallas* does not apply in the case at bar. *Dallas* was an 8(b)(7)(A) case with a critically different emphasis. For 8(b)(7)(A) proscribes picketing where a certified representative already exists and "a question concerning representation may not appropriately be raised under Section 9(c) of the Act . . ." . *Dallas* was a case in which the court found that the actions of the Council were an improper intrusion into a subject matter which a certified union had made bargainable and had bargained upon. The court reasoned, in that case, that if the Council's sub-contracting agreement was signed by the contractor's association, the already bargaining unions would be deprived of substantial bargaining leverage in the future. In the case at bar, such a situation does not exist; the contractor's employees are not being represented, no one is seeking to represent them, and there having been no bargaining on their behalf, *Dallas*, therefore, and the cases upon which it is based, are clearly distinguishable from the facts of the case at bar. Any finding of recognitional or organizational objective based on that decision under the facts of that case is obviously improper.

Additionally, much weight was given by the Board to the alleged statements of Robert Williams as reflecting

some type of evidence of the object of the picketing. It is unfortunate that the Board apparently chose to place so much emphasis on the alleged statement of Mr. Williams because that tends to minimize the importance of the legal question of whether or not the pure sub-contractor's agreement is outside the scope of Section 8(b)(7)(C).

However, a review of the record as a whole clearly indicates that there is not sufficient evidence to substantiate the finding of the Board that Williams' statement established that the picketing had a recognitional objective.

The extensive, clear, and absolute unchallenged testimony of Council Business Manager, Thomas Magrann, establishes without question that there was no organizational purpose of the picketing and that all of the delegates to the Council were so advised. Both Judge Becker, in the district court action regarding the related 10(1) proceeding, and the trial examiner rejected the alleged statement of Williams as a basis for finding an organizational objective. It should also be noted that the Court of Appeals, in upholding the decision of the Board, relied strictly on the questions of law covered by the *Dallas* case, *supra.*, and gives no weight to the finding of the Board of an alleged statement by Williams concerning the objective of the picketing.

The Board disagrees with the conclusions of Judge Becker and of the trial examiner that the statement of Williams was not entitled to any weight, alleging that the Council should be bound by the statement of Williams because the statement was never disavowed by the Council.

The fact of the matter is that neither Council nor anyone acting on its behalf could conceivably have had any knowledge of the alleged statement being made until the hearing was conducted on the Section 10(1) injunction before the federal district court. At this hearing, the statement by Williams was succinctly disavowed in terms of the objectives to which Business Manager Thomas Magrann testified, the testimony of Council's counsel and the under-

standing of the charging party himself as to the limited objective of the picketing (as reflected in the original charge which was filed).

The record, as a whole, clearly establishes that it was the position of the Council throughout that its picketing had no organizational or recognitional objective, and there is no basis for the holding by the Board that the one alleged statement of Council Representative Williams, gave rise to an organizational object when there was, in fact, none.

The reliance of the court below on the *Dallas* case, was clearly inappropriate in light of the significant factual differences between that case and the controversy at bar. Based on that and the statutory interpretation discussed above and the fact that the record, as a whole, fails to substantiate the existence of any organizational or recognitional objective in the picketing of the petitioner in this case, the decision below is clearly erroneous and merits a review by this Court.

## CONCLUSION

In the final analysis, there can be no doubt but that the correctness of the decision below is open to serious question. There exists a real conflict between the decision of the Third Circuit in this case and the decisions of other federal courts and the National Labor Relations Board in similar to parallel cases. A review of the legislative history and the cases which interpret sections of the Act involved herein establishes that there is a conflict in the rationale and theories relied upon by the Board and upheld by the court below with the clear purposes of these Sections of the Act as espoused by the legislative history and other case law.

Additionally, the adverse impact of the decision in this case on the construction industry cannot be minimized. The fact that a review of the decisions relied on by the Board and the court below show that because of factual

differences such reliance was misplaced only strengthens the need for a reversal of the decision below and the handing down of guidelines from the Supreme Court to insure that the congressional intent in granting the construction industry proviso of Section 8(e) of the Act is respected and upheld and that the viability of that Section continues to exist.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

MERANZE, KATZ, SPEAR &
WILDERMAN
BERNARD N. KATZ
WARREN J. BORISH
*Counsel for Petitioner*

# APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

201 NLRB No. 42

D—7074
Philadelphia, Pa.

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY

and

SAMUEL E. LONG, INC.

Case 4—CP—181

## DECISION AND ORDER

On August 29, 1972, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] the General Counsel filed cross-exceptions and a supporting brief, and the Charging Party filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, and to adopt his recommended Order, except as modified herein.

The Administrative Law Judge found, and we agree, that Respondent's picketing had an object of forcing or requiring the Charging Party to recognize and bargain with Respondent as the representative of its employees, and thus violated Section 8(b)(7)(C) of the Act. The General Counsel further contends that such picketing also had the

1. Respondent's request for oral argument is hereby denied, as the record, including the briefs, adequately presents the issues and the positions of the parties.

unlawful object of forcing or requiring the Charging Party's employees to accept or select Respondent as their collective-bargaining representative. Unlike the Administrative Law Judge, we find merit in this contention.

On January 24, 1972, the day the picketing began, Williams, then vice president of Respondent, told two school district officials that the picketing was organizational. When the school district officials asked whether the pickets were there to organize the Charging Party because it was non-union, Williams answered, "Yes." Boyer, who, as chairman of a committee of business agents of the labor organizations affiliated with Respondent, was in charge of the picketing herein, nodded. Although the picketing was still in progress as of the date of the hearing in this case, 5 months later, Respondent had taken no action to disavow the statements by Williams.

The Administrative Law Judge viewed these statements as insufficient to show an organizational object, reasoning that Respondent's delegates, rather than Williams, determined the purpose of the picketing, and that the above statements by Williams were therefore irrelevant. There is no dispute that the picket line was established pursuant to the recommendation of Respondent's business manager that the Charging Party be picketed "for a subcontractors agreement." However, the failure of the delegates expressly to authorize organizational picketing does not preclude a finding that *an* object was organizational, especially as such an additional object is in no way inconsistent with the stated purpose. We have held that a union is responsible for a picket's statement as to the purpose of the picketing, when such statement is made in the presence of the union's agent and is not contradicted by him.[2] This conclusion follows *a fortiori* in the instant case, where both Williams, who stated that the picketing was organizational, and Boyer, who confirmed this statement by nodding,

2. *United Hatters, Cap & Millinery Workers International Union, AFL—CIO (Louisville Cap Co.)*, 125 NLRB 1078, 1080, fn. 9, enfd. in pertinent part 288 F.2d 436 (C.A. 6).

were high-ranking officials of Respondent; had told the school district officials that they were representing Respondent; and had at least apparent authority to state the purpose of the picketing,[3] and the statements made were never disavowed by Respondent.

Accordingly, we conclude that Respondent is bound by Williams' statements and find, on the basis of these statements and the entire record in this case, that Respondent's picketing had a further object of forcing or requiring the Charging Party's employees to accept or select Respondent as their bargaining representative, and, for that additional reason, violated Section 8(b)(7)(C) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, the Building and Construction Trades Council of Philadelphia and Vicinity, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1 of the Recommended Order:

"1. Cease and desist from picketing, or causing to be picketed, Samuel E. Long, Inc., where an object thereof is forcing or requiring such employer to recognize or bargain with Respondent as the collective-bargaining representative of its employees, or forcing or requiring employees of such employer to accept or select Respondent as their

3. Sec. 2(13) of the Act reads, "In determining whether any person is acting as 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

collective-bargaining representative, at a time when Respondent is not certified as such representative and where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed 30 days from the commencement of such picketing."

2. Substitute the attached notice for the Administrative Law Judge's.

Dated, Washington, D.C. Jan. 18, 1973.

EDWARD B. MILLER
Chairman
RALPH E. KENNEDY
Member
JOHN A. PENELLO
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 73-1261

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner*

*v.*

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY,
*Respondent*

SAMUEL E. LONG, INCORPORATED, *Intervenor*

On Application for Enforcement of an Order of the National Labor Relations Board and on Petition to Vacate and Set Aside an Order of the National Labor Relations Board.

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Argued September 17, 1973

Before: KALODNER, ALDISERT and GARTH,
*Circuit Judges*

### JUDGMENT ORDER

After considering the contentions of the National Labor Relations Board, the intervenor, and the respondent-petitioner for review, it is

ORDERED AND ADJUDGED that the petition of the Building and Construction Trades Council of Philadelphia and Vicinity to vacate and set aside the order of the National Labor Relations Board be and the same is hereby

denied and that the application by the National Labor Relations Board for enforcement of its order be and the same is hereby granted. See, *Dallas Building & Construction Trades Council v. National Labor Relations Board*, 396 F.2d 677 (D.C. Cir. 1968). Costs taxed against respondent-petitioner.

BY THE COURT.

ALDISERT
Circuit Judge

Attest:

Thomas F. Quinn
Clerk

DATED: Sept. 19, 1973

# APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 73-1261

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner*

*v.*

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY,
*Respondent*

SAMUEL E. LONG, INCORPORATED, *Intervenor*

## SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by

Respondent

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ALDISERT
Judge

Dated: October 11, 1973

# APPENDIX C

* * *

NATIONAL LABOR MANAGEMENT RELATIONS ACT OF 1947, AS AMENDED SECTION 8(b)(7)(C), 29 U.S.C. SECTION 158 8(b)(7)(C):

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the

part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

* * *

# APPENDIX C

NATIONAL LABOR RELATIONS ACT OF 1947, AS AMENDED, SECTION 8(e), 29 U.S.C. SECTION 8(e):

8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * *

# APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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BERNARD SAMOFF, Regional Director of the Fourth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Civil Action No. 72-634

*v.*

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY

## OPINION AND ORDER

Becker, J. July 7, 1972

### I. PRELIMINARY STATEMENT

Samuel E. Long Inc. ("Long") is a general contracting firm which is engaged in the construction of an addition to a school in West Chester, Pennsylvania. The workmen who are employed directly by Long are not members of any labor union. The Building and Construction Trades Council of Philadelphia and Vicinity ("Council") is an unincorporated association whose membership is composed of delegates from some 163 craft unions and councils in the building and construction industry in Philadelphia County and the surrounding counties of Delaware, Chester, Montgomery and Bucks in southeastern Pennsylvania. While its functions are many, the Council does not, qua Council, seek to organize or act as a collective bargaining representative for individuals employed by any firm engaged in the construction industry.

On January 24, 1972, the Council commenced picketing at the East Junior-Senior High School construction site, where Long is the general contractor. It is undisputed that the picketing has continued from January 24 to the present time and that it has brought the work, which is approximately 35% complete, to a virtual halt, because the employees of those union subcontractors who are on the job have refused to cross the picket line.

This case arises under §10(1) of the Labor Management Relations Act ("Act"), 29 U.S.C. §151 *et seq.* The petitioner, Bernard Samoff ("Samoff"), Regional Director of the Fourth Region of the National Labor Relations Board ("Board") has sought, on behalf of the Board, a preliminary injunction restraining the picketing on the grounds that it violates §8(b)(7)(C) of the Act (see text *infra*). In general, §8(b)(7)(C) proscribes organizational or recognitional picketing for more than thirty days without the filing with the Board of the petition for certification under §9(c) of the Act. The Council contends that its picketing is not for any organizational or recognitional purpose, but rather, to obtain from Long what is known in the construction industry as a "subcontractors agreement", *i.e.*, an arrangement pursuant to which a general contractor agrees that whenever he subcontracts work on any construction job, he will employ only subcontractors who, before commencing work on the job site, have entered into collective bargaining agreements with craft unions affiliated with the Council. The Council asserts that picketing for this purpose is not proscribed by §8(b)(7)(C). On the other hand, the Board contends that, even if we find that the Council's purpose in picketing was not, as the Board asserts, to organize Long's employees, §8(b)(7)(C), read in the context of this case, also prohibits picketing by the Council for a subcontractors agreement. The theory behind this contention is that the objective of the Council's picketing is to force Long to deal with it on a matter (subcontracting) which is a proper subject of collective bargaining and which inevitably and substantially affects the working

conditions of Long's employees; that the picketing is, a fortiori, recognitional in nature; and that it is therefore in violation of §8(b)(7)(C).

In support of its position, the Board relies heavily on a case emanating from the Court of Appeals for the District of Columbia, *Dallas Building and Construction Trades Council v. N.L.R.B.*, 396 F.2d 677 (1968), and also upon a case on which *Dallas* in turn relies, *Centralia Bldg. and Constr. Trades Council v. N.L.R.B.*, 363 F.2d 699 (D.C. Cir. 1966). *Centralia* deals with the factual situation which is involved here, and *Dallas*, which is the closer case of the two on the facts, deals with §8(b)(7)(A) which, for reasons discussed *infra*, has a significantly different thrust. In fact, there is no case reported or unreported which we could find or to which able counsel could direct us which squarely deals with the question of whether subcontractor picketing violates §8(b)(7)(C), a question which, we note, is apparently growing in importance because of the increasing use, by building trades councils, of the subcontractor picketing device.

We have reviewed the evidence taken at the extensive preliminary injunction hearing which we held in the case, and have studied the parties' briefs. We find (see *infra*) there is reasonable cause to believe that the purpose of the picketing was not to organize Long's employees, but to obtain from Long a subcontractors agreement. We are not unmindful of the Board's legal position which it has cogently expressed that subcontractor picketing violates §8(b)(7)(C), nor of its concern that widespread contractor picketing will impede the flow of commerce; however, for the reasons which follow, we do not read §8(b)(7)(C) as proscribing that type of picketing. Accordingly, despite our limited role in §10(l) proceedings,[1] the Board's prayer for injunctive relief will be denied.

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1. Our judicial role in this case is a limited one. We are bound by the principles enunciated in Schauffler ex rel N.L.R.B. v. Local 1291, Int'l Longshoremen's Ass'n, 292 F.2d 182 (3d Cir. 1961), as follows:

Before analyzing the Act, the legislative history and the caselaw, we must set forth the findings deal in this Opinion with the assertion by the Council that it is not a labor organization within the meaning of the Act and that it is therefore not subject to §8(b)(7)(C) at all.[2]

## II. PURPOSE OF THE PICKETING

The record has raised a factual dispute as to the purpose of the picketing. The picketing commenced on the morning of January 24, 1972. At that time Robert Williams ("Williams") and Charles Boyer ("Boyer"), who are delegates to the Council, went to the scene to supervise the picketing. Acting on the instructions of Thomas Magrann ("Magrann"), the Council's business agent, they sought and obtained a meeting with the principal of the school for the purpose of requesting the school authorities to erect a sign directing construction workers to the construction entrance, which is separate from the main entrance to the junior high school, so that there could be no disruption of school activities. According to William K. Dowler and Donald R. Howland, school officials who were present at the meeting, Williams stated that the nature of the picketing was "organizational", and that they were there "to organize Sam Long because he is non-union."[3] This part of the con-

Note 1—*Continued*

"[I]t must be borne in mind that a Section 10(1) injunction is interlocutory in nature and only remains in force pending the final adjudication of the Board with respect to the unfair labor practice charge . . . The Board need not show that an unfair labor practice has been committed, but need only demonstrate that there is *reasonable cause to believe that the elements of an unfair labor practice* are present. Nor need the Board conclusively show the validity of the propositions of law underlying its charge, it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous. . . ." (emphasis added).

2. This Opinion constitutes our findings of fact and conclusions of law pursuant to Fed. R. Civ. Proc. 52(a).

3. While Long regularly subcontracts certain portions of construction projects (and on projects such as East High School, State

versation lasted about 35 seconds during a fifteen minute meeting. Based upon this evidence, the Board has asked us to find that there is reasonable cause to believe that the purpose of the picketing was in fact to organize Long's employees.

The Council has not attempted to controvert the fact of Williams' replies; it has however argued that they are not entitled to credence. This argument stems from the Council's contentions that Williams had no authority to make representations as to the purpose of the picketing and that he was in any event totally incorrect as to its purpose as shown by the explicit record of official union action. We credit the Council's position, and recite the following as background for our finding that there is reasonable cause to believe that the purpose of the picketing was *not* to organize Long's employees, but to obtain from Long a subcontractors agreement.

In September of 1971, the Board and the Council entered into a stipulation terminating the §10(l) proceedings between them before Judge Alfred L. Luongo of this Court, arising out of the Council's picketing of a firm known as Office Developers Inc.[4] *Inter alia*, that stipulation, which was approved by the Court, recited that if the Council were to resume picketing solely for the purpose of forcing Office Developers Inc. to agree to use only union subcontractors, it would not be considered in violation of a decree entered by the Court proscribing violations of §8(b)(7)(C). Following the Office Developer's stipulation, Bernard N. Katz, Esq. ("Katz"), the Council's attorney, advised the Council to use the subcontractor picketing device in appropriate

law requires the separate letting of the plumbing, heating and electrical work), it maintains a cadre of some fifty regular employees who do all of the carpentry, drywall, masonry and ironworkers work on all of its jobs and often do glass, linoleum, electrical, bricklaying and asbestos work as well. Long's work ranges from home remodeling and single home construction to a major project such as East High School. On larger jobs, major portions of the work are subcontracted.

4. E.D. Pa. C.A. No. 71-2204.

situations. The Council thereupon undertook an orientation program looking toward future use of subcontractor picketing.[5] On October 17, 1972, Katz addressed the Council members at its regular meeting with respect to the incidents of subcontractors agreements and the guidelines for subcontractors picketing.

By December of 1971, the Council had become aware that the Long job was progressing in West Chester. On December 7, 1971, pursuant to authorization by Magrann, Katz wrote to Samuel Long, the principal of the corporation. After reciting that Long was not a party to a subcontractors agreement, Katz stated:

> "This office is counsel for the Building & Construction Trades Council of Phila. & Vicinity. We have been advised that you are performing work within the jurisdiction of the Council and that you are not a party to a subcontractors agreement under which you would

5. Prior to and during the hearing in this case, the Council asserted that the Board was estopped to charge it with an 8(b)(7)(C) violation in this case. The elements of the estoppel claim were: (1) that the Board's position in the *Office Developers* case led the Council into the belief that subcontractor picketing did not violate §8(b)(7)(C); (2) that the Council relied thereon; and (3) that the reliance was to the Council's detriment because it thereby determined to forego other remedies available to it in the Long situation, including: (a) efforts to organize Long's employees and/or the employees of the eight non-union subcontractors on the East High School job; and (b) picketing to compel Long to comply with area standards with respect to wages and conditions of employment. However, in its post hearing brief, the Council did not press the estoppel argument.

The Board denies that it ever committed itself to the position that subcontractor picketing does not violate §8(b)(7)(C). It reads the Office Developers stipulation in a manner different from the Council and points out that the stipulation was the vehicle for the *settlement* of the Office Developer's litigation and that no precedent can accordingly be drawn therefrom. In any event, even if we found facts amounting to an estoppel, which we do not, as a matter of law there can be no estoppel against the Board, *NLRB v. Laister-Kauffman Aircraft Corp.*, 144 F.2d 9 (8th Cir. 1944), or against the United States, CJS 690 n. 69.10.

be obliged to subcontract to organizations dealing with craft unions affiliated with the Council.

"Picketing is presently being contemplated at such of your operations as the school construction in West Chester, Penna. *Such picketing will have as its objective solely the obtaining of the referred to agreement.* It will not have as its objective any actions which are in any way limited or prohibited by the Labor Management Relations Act of 1947." (emphasis added).

Samuel Long received but did not respond to the letter. At the Council's mid-December meeting, the Long situation was discussed and the Council was advised by Magrann that subcontractor picketing was being contemplated. On January 19, 1972, the Council again met with Williams and Boyer in attendance. At that meeting, the Council authorized the picketing of Long to obtain a subcontractors agreement. The minutes of the meeting reflect this decision and recite that the picket lines were to be established on January 24, 1972 at 7:30 A.M., as they, in fact, were. The signs carried by the pickets read:

"NOTICE

Sam Long Contractor Refuses to enter into a Sub-Contractors Agreement with the Philadelphia, Pennsylvania Building & Construction Trades Council AFL-CIO"

The purpose of the Union's picketing at the East High School site was also the subject of testimony at the hearing by Magrann and Katz. Both witnesses testified unequivocally that the (ongoing) picketing has but one purpose: to compel Long to execute a subcontractors agreement with respect to future jobs. They emphatically eschewed any intention to organize Long's employees or to affect the present job in any way, even with respect to nonunion subcontractors to whom contracts had been let but who have

not yet entered on the job. They also pointed out that a subcontractors agreement does not require Long to subcontract work: Long is free to subcontract or not as it chooses. The agreement applies only when Long chooses to engage subcontractors. The form of subcontractors agreement sought by the Council was introduced into evidence (E6). That agreement provides, in pertinent part, that:

> "1. The General Contractor agrees to provide in its specifications when doing any business with subcontractors for work on the job site, that such subcontractors as a condition precedent to their commencing work on the job site will be signed with a member union of the Council who is the recognized collective bargaining agent of the particular trade.
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> 2. The General Contractor agrees that no subcontractors will be awarded any work on the job who do not meet the provisions of Paragraph 1 above and that no such subcontractor will be permitted to perform any work on the job."[6]

The testimony about the letter to Long and the Council meetings is uncontradicted. We credit that testimony as well as that of Magrann and Katz as to the purpose of the picketing. The by-laws of the Council are consistent with this testimony as is the further testimony of Magrann and Katz that the Council never seeks to organize employees in the building trades and to act as their collective bargaining representative. We therefore find reasonable cause to believe that the purpose of the Council's picketing is to attempt to secure from Long a subcontractors agreement, not to organize Long's employees or to obtain for the Council or any of its affiliated craft unions recognition from Long as their bargaining agent. We recognize the validity of the proposition that picketing may have more

6. The proposed agreement applies only to work performed in the five counties under the Council's jurisdiction.

than one purpose, and that, in order to violate §8(b)(7)(C), it is necessary only that organization and recognition be *a* purpose of the picketing.[7] However, we find no reasonable basis for the conclusion that the picketing had any purpose other than seeking a subcontractors agreement.[8] Whether the law deems that purpose to be recognitional in character will be discussed, *infra*.

## III. IS THE COUNCIL A LABOR ORGANIZATION WITHIN THE MEANING OF THE ACT?

The Council has contended that it is not a labor organization (or an agent for a labor organization) within the meaning of the Act, and therefore not subject to injunctive relief because §8(b)(7) applies only to the actions of labor organizations or their "agents". Section 2(5) of the Act defines "labor organization" as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in

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7. *See* Local 346 International Leather Goods Union v. Compton, 292 F.2d 313 (1st Cir. 1961); Department & Speciality Store Employees' Union v. Brown, 284 F.2d 619 (9th Cir.), *cert. denied*, 366 U.S. 934, 81 S.Ct. 1659, 6 L.Ed.2d 846 (1961); Joiner, Inc., 135 NLRB 876; NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951), 71 S.Ct. 943, 95 L.Ed. 1284; International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299 (1951); Samoff v. Teamsters Local 115, 338 F. Supp. 856 (E.D. Pa. 1972).

8. It should also be noted that when Samuel E. Long, President of the company, signed an unfair labor practice charge against the Council, he stated that "the exclusive purpose of the picketing was to compel the general contractor at work on the project, Samuel E. Long, Inc., to execute a subcontractors agreement." He signed a similar affidavit in a Chester County Court of Common Pleas action. We note too that Long testified at the hearing that he understood that the subcontractors agreement would not affect his company's own employees.

part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Many facts pertaining to the nature and activities of the Council were adduced at the hearing. These facts stem, in part, from the Council's by-laws and in part from testimony as to the Council's practices.

One of the Council's main objectives is to enlist the cooperation of its component local unions, to the end that adequate wage scales and working conditions be established and maintained in the building industry. The Council's jurisdiction encompasses "full autonomy over all matters affecting all workmen engaged in said [building] industry". The duties of the Council's business manager include the representation of the Council and its members in matters pertaining to agreements, working conditions, complaints, disputes and organization. The business manager has the power to "order all strikes" when instructed to do so by the Council or its Executive Board, and to order employees on a struck job to leave it. He has the duty to report to the Council any member of an affiliated craft who refuses to stop work when ordered.

In general, the delegates to the Council are salaried officials of the local unions which they represent. The number of delegate votes allotted to affiliated locals is determined by the number of members the local has. The Council's officers are elected from among the delegates. Members of the local unions which send delegates to the Council are not, as such, members of the Council. However, members of the affiliated locals pay dues to the Council and must have their Council membership card in their possession at all times. Moreover, members of the local unions generally act as pickets on the various strikes called by the Council.

The Council does not, as such, seek to organize the employees of any given employer in any given trade or to act as the collective bargaining representative of such employees. However, it assists its affiliated locals in

organization drives and it negotiates and deals directly with employers in the construction industry over certain matters. First of all, as this case exemplifies, the Council attempts to obtain subcontractor agreements. Secondly, it receives complaints from employees concerning employers who are not meeting area standards and engages in picketing to enforce area standards. Thirdly, it deals with the General Building Contractors Association Inc. ("GBCA") which represents the employers in its five county area to obtain an agreement setting forth the conditions under which elevator service shall be furnished to transport workmen in its affiliated trades while buildings are in the course of construction. Fourthly, it deals with the GBCA concerning jurisdictional disputes. Finally, and most recently, the Council has sought and obtained from the GBCA a so-called multi-trade agreement tying together the commencement and expiration dates of the collective bargaining agreements of the affiliated trades in the five-county area.

The foregoing facts indicate that the Council exists, at least in part, for the purpose of dealing with employers concerning labor disputes, wages, rates of pay, hours of employment and conditions of work, and that employees participate in its activities so as to bring it within the concept of a labor organization as defined in §2(5). We therefore find that there is reasonable cause to believe that the Council is a labor organization within the meaning of the Act.[9]

This conclusion finds support in numerous decisions of the Board. *Building and Construction Trades Council of Orange County*, 157 NLRB 375 (1966); *International Brotherhood of Electrical Workers, Local 1* (Building and Construction Trades Council of St. Louis), 164 NLRB 313 (1967); *Local 60, International Association of Bridge,*

9. It should be noted that the "reasonable cause" yardstick of §10(b) extends to all elements of the case. *Madden v. International Organization of Masters, Mates & Pilots*, 259 F.2d 312 (7th Cir.), *cert. den.* 358 U.S. 909 (1958).

*Structural and Ornamental Iron Workers, and Nalews, Inc.*, 177 NLRB 289 (1969); *Building and Construction Trades Council of Reading and Berks County*, 155 NLRB 1184 (1965); *Alton-Wood River Building and Construction Trades Council*, 114 NLRB 260 (1963). In each of these cases, the Board held that building and construction trades councils whose by-laws and activities were similar to the Council involved in the present case labor organizations within the meaning of the Act.[10] There are some Board cases holding that district trade councils are not labor organizations within the Act, *see Magnavox Company*, 111 NLRB 379 (1955); *Monsanto Chemical Company*, 119 NLRB 69 (1957). However, these cases dealt with the status of councils as labor organizations vis-à-vis certain filing requirements of the Act. On the other hand, the cases cited above in which the Board has found councils to be labor organizations are cases in which, as in the case at bar, the council engaged in picketing, and in which the Board filed an unfair labor practice charge bottomed on either §8(b)(4) or §8(b)(7).[11]

In the *Alton-Wood River* case, *supra*, the Board, in what we agree is the proper approach, viewed the by-laws and activities of the council "in their entirety". It thereupon found that the council was the organization through which the affiliated crafts functioned as a unit, and concluded that the council was "dealing with" employers, even though the recognition which the council sought by its picketing was for its affiliated local. In the *Nalews* case, *supra*, the Board found that the council was engaged in a joint enterprise with its affiliated unions in furtherance of their interest with regard to wages, hours and working conditions,

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10. *See also Winwake Inc.*, 141 NLRB 38 (1962) and *Pass Development Inc.*, 154 NLRB 169 (1965), where on facts similar to the case at bar, trade councils were assumed to be labor organizations (the question was not raised).

11. *Magnavox* and *Monsanto* were also distinguished by the Board in the *International Brotherhood of Electrical Workers* case (St. Louis council case), *supra*.

and that it acted as their agent in matters of common interest. The Board's decision in the *Reading and Berks County* case, *supra*, was to the same effect and stressed the broad import of §2(5).

It may be (although we doubt that they can be read so narrowly) that these last cited cases turn on the fact that §8(b)(7) applies to "agents" of labor organizations, and that they in fact hold that the councils involved were acting as agents for their local unions and thus were subject to the proscriptions of the Act. If they do, they equally support our determination.

Having concluded that there is reasonable cause to believe that the Council is subject to the Act,[12] we must now analyze the factors bearing upon whether there is reasonable cause to believe that it has violated it.

## IV. DOES THE ACTION OF THE COUNCIL IN PICKETING TO SEEK A SUBCONTRACTORS AGREEMENT FROM LONG CONSTITUTE A VIOLATION OF §8(b)(7)(C) OF THE ACT?

Section 8(b)(7) of the Act, in pertinent part, provides:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—. . . .
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recog-

12. In 1959, Congress enacted the Labor Management Reporting and Disclosure Act (Landrum-Griffin Act), 29 U.S.C. 401 et seq. and specifically included joint councils within the definition of labor organizations. The Council argues that the failure of Congress to amend §2(5) at the same time indicates an intention to exclude councils from its orbit. We find this argument to be unpersuasive.

> nize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act, . . . or
>
> (C) where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, that when such a petition has been filed the Board shall forthwith, without regard to the provisions of Section (c)(1) or the absence of a showing of substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: . . ."[13]

Resolution of the matter before us requires that we address ourselves to the meaning of the notions of organization and recognition embodied within §8(b)(7).

We have found that there is reasonable cause to believe that the Council's sole purpose was to secure a sub-

13. §8(b)(7)(C) contains an "informational picketing" proviso. However, the parties agree that the proviso is inapplicable in this case.

contractors agreement from Long, and that it did not seek to set up itself or any of its affiliated local unions as the bargaining agent for Long's employees. This conclusion would seem, at least at first blush, to rule out any notion that the picketing had an organizational or recognitional purpose. The Board, however, asserts that such a reaction is too simplistic, and misconceives the meaning at least of the term "recognition" within the framework of the Act. For, in the Board's view, the act of seeking from a building trades employer such as Long, an agreement to subcontract only to firms which have entered into collective bargaining agreements with craft unions affiliated with the Council is an act which looks toward or partakes of recognition of the Council by Long with respect to terms and conditions of employment.[14]

In support of its position, the Board notes that the decision of the Supreme Court in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S. Ct. 398 (1964) establishes that stipulations with respect to contracting out of work performed by members of a bargaining unit is a "term and condition of employment" for which collective bargaining is required. The argument continues to the effect that execution of a subcontractors agreement would indeed affect the right of Long's employees to select their exclusive bargaining agent because, by virtue of the agreement, the Council would have assumed the role of the Long employees' exclusive collective bargaining representative at least as to one significant and mandatory subject of bargaining (*i.e.*, subcontracting), and because the status of any other bargaining agent subsequently selected by Long's employees would concomitantly be hampered. The Board attempts to apply the force of judicial precedent to these contentions through the vehicle of *Dallas Building and Construction Trades Council v. NLRB, supra.*

14. At the hearing, the Board made an initial attempt to demonstrate that a subcontractors agreement would have a direct effect upon the terms and conditions of employment of Long's own employees but was unsuccessful. The Board did not pursue the point thereafter.

In *Dallas*, the court had before it a petition for review and a cross petition for enforcement of an Order of the Board which had concluded that the Dallas Building and Construction Trades Council had violated §8(b)(7)(A) by picketing with a recognitional objective at a time when, under the Board's contract bar rules, no question of recognition could be raised. The intervenor was Dallas County Construction Employers Association, Inc., which had collective bargaining agreements with the local craft unions affiliated with the Trade Council. The case was set against an unusual background. Four of the council's eight local union affiliates, after negotiations, had entered into contracts with the Association which did not contain subcontracting clauses, but which contained other improvements in wages and working conditions *in lieu thereof*. The council, on the other hand, was now proposing to the Association that it sign a subcontractor agreement with it and persisted in this demand. When the Association refused, notwithstanding the council's rather stark conflict with its affiliated locals, it commenced picketing against the Association to compel the signing of a subcontractor agreement, leading to the charges and counter-charges before the Board.

In view of the fact that the Dallas Council (like the Philadelphia Council) did not directly organize employees in the building trades, the *Dallas* court had to confront the question of whether the council's picketing had a recognitional objective. The court found that it did and, therefore, held that the picketing violated §8(b)(7)(A). In so doing, the court observed as follows:

> "[W]hile the legislation was initially motivated by blackmail picketing and inter-union warfare, the proscriptions of Section 8(b)(7) are not confined to that context. Congress in terms outlawed any picketing which sought to compel the employer to recognize and deal with a nonrepresentative labor organization on the subjects which could substantially affect the working conditions of the employees. And the agree-

ment proposed by the Council would have a significant impact upon some of the general contractors' employees. The Supreme Court has recognized that subcontracting is a mandatory bargaining subject; and the Board has found in this case that the adoption of the proposed agreement might vitally affect the number of employees hired by the general contractors. This is so because there are some types of work, laboring and millwrights' work, for example, which the general contractors sometimes subcontract and sometimes perform with their own employees. Without a union signatory agreement as proposed by the Council, the general contractors are likely to send out such work to relatively cheaper, non-unionized subcontractors rather than to perform it with their own higher-cost union employees." (footnote omitted).

The *Dallas* holding was followed in *Lane-Coos-Curry-Douglas Counties Bldg. & Construction Trades Council v. NLRB*, 415 F.2d 656 (9th Cir. 1969) (Carter, J. dissenting).

In its discussion of the issues, the *Dallas* court relied upon its prior decision in the case of *Centralia Bldg. and Construction Trades Council v. NLRB*, 363 F.2d 699 (D.C. Cir. 1966), which upheld the Board's determination that picketing by an unrecognized council to obtain an agreement from a non-union employer obligating him to pay his employees union scale wages and fringe benefits was recognitional and therefore in violation of §8 b)(7)(C). In language which is also relied upon by the Board in this case, the *Dallas* court stated:

"*Centralia*, however, does not mean that Section 8(b)(7) is violated only when the picketing union seeks to preempt the entire scope of interest of a recognized representative of the employees. *The thrust of Centralia is that, so long as the union seeks a contract dealing with a subject relating to the conditions of employment of the general contractors' own employees, the picketing is recognitional within Section 8(b)(7).*" (emphasis added). *Id.* at 683.

As we have noted, since subcontracting is a condition of employement upon which Long's employees, if organized, might bargain, *see Fibreboard Paper Products v. NLRB*, *supra*, the Board contends that the language from *Centralia*, adopted in *Dallas*, requires a finding that the picketing was recognitional in character here. We do not agree.

We note that in *Centralia*, at the critical point in its Opinion, the court observed:

> "With such an agreement in effect [i.e., that the wage and fringe benefits of the contractors employees would be comparable to those under union agreements], very little would be left in the field of collective bargaining to a representative chosen by Pacific's employees, and therefore the will and choice of employees when and if exerted with respect to a bargaining agent would be thwarted and nullified." *Id.* at 701.

The court seems to be saying that the extent to which the picketing organization is seeking to assume normal collective bargaining functions with regard to an employer's employees is determinative of whether the picketing has a lawful or unlawful objective under §8(b)(7). We view the *Centralia* case as setting forth this proposition and nothing more. It is thus distinguishable from the case before us because of the relatively small effect that the subcontracting agreement would have on the ability of Long's employees to engage in the full panoply of normal bargaining functions.

Furthermore, even though the *Dallas* court appears to be extending the *Centralia* rule, we agree with the Council that *Dallas* is not apposite here. *Dallas* was an §8(b)(7)(A) case with critically different emphasis. For §8(b)(7)(A) proscribes picketing where a certified representative already exists and "a question concerning representation may not appropriately be raised under §9(c) of the Act. . . ." *Dallas* was a case in which the court found that the actions of the Council were an improper intrusion into a subject matter which a certified union had made

bargainable and had bargained upon. Subcontracting proposals had been rejected and traded off for other benefits, and the Court reasoned that if the council's subcontracting agreement were signed by the contractors association, the already recognized union would be deprived of substantial bargaining leverage in the future. Moreover, the courts in *Dallas* and *Lane-Coos* were faced with the startling and unseemly situation of a trade council seeking to undermine the status of one of its own members and their holdings, we believe, may also be interpreted, sui generis, as a special and perhaps appropriate response thereto. In the present case, these problems do not exist. Long's employees are not represented; there has been no bargaining on their behalf.

We do not believe, however, that the Board's application of the *Dallas* rationale may be disposed of with finality by merely distinguishing *Dallas* and *Centralia* on their facts. The notion that coercive action by a labor organization looking towards a contract relating to the conditions of employment of the contractor's own employees must be deemed to be recognitional in character for §8(b)(7)(C) purposes regardless of whether the labor organization seeks to become the collective bargaining agent of those employees is a thoughtful one. We must therefore deal with it in terms of the legislative history and meaning of §8(b)(7)(C) as well.

The legislative history of §8(b)(7)(C) makes it clear that the section was principally directed to "blackmail picketing", or picketing by a union to achieve exclusive representation without a majority showing of interest. In enacting the section, Congress wished to encourage prompt resort to the election machinery rather than protracted picketing, as the method for resolving representation questions. *See, e.g.*, 105 Cong. Rec. 1152-1153, II 1959 Leg. Hist. 976; 105 Cong. Rec. 1567, II 1959 Leg. Hist. 993; 105 Cong. Rec. 1568-69, II 1959 Leg. Hist. 994-995; 105 Cong. Rec. 5464, II 1959 Leg. Hist. 1029; 105 Cong. Rec. 5951-5970, II 1959 Leg. Hist. 1174-1193; and also, Legisla-

tive History of the Labor-Management Reporting and Disclosure Act of 1959 at pp. 470–473:

> "The McClellan committee found that 'the weapon of organizational picketing had been abused' by its use without regard to the desires of the employees in question. . . . Organizing from the top rather than persuasion of the employees has become the standard organizing procedure of many unions. . . . The union seeks to bring economic pressure directly upon the employees to force them to join the union in order to protect their jobs. . . . Such picketing also has the purpose of coercing the employer into recognizing the union and signing a contract with it, thus forcing the employees to join, even though the employees have shown that they do not want the union as their bargaining agent. It would be difficult to imagine a tactic more alien to the free choice with respect to unionization that the Taft-Hartley Act guaranteed to employees. . . ."

The leading case construing §8(b)(7)(C) is the decision of the Board in *Charles A. Blinne, d/b/a C. A. Blinne Construction Co.*, 135 NLRB 1153 (1962). In that case, the Board observed:

> "The intent of subparagraphs (A) and (B) is fairly clear. Congress concluded that where a union has been lawfully recognized and a question concerning representation cannot appropriately be raised, or where the employees within the preceding twelve months have made known their views concerning representation, both the employer and the employees are entitled to immunity from recognition or organization picketing for prescribed periods.
>
> Congress did not stop there, however. Deeply concerned with other abuses, most particularly 'blackmail' picketing, Congress concluded that it would be salutary to impose even further limitations on picketing

for recognition or organization. Accordingly, subparagraph (C) provides that even where such picketing is not barred by the provisions of (A) or (B) so that picketing for recognition or organization would otherwise be permissible, such picketing is limited to a reasonable period not to exceed thirty days unless a representation petition is filed prior to the expiration of that period. Absent the filing of such a timely petition, continuation of the picketing beyond the reasonable period becomes an unfair labor practice. On the other hand, the filing of a timely petition stays the limitation and picketing may continue pending the processing of the petition. Even here, however, Congress by the addition of the first proviso to subparagraph (C) made it possible to foreshorten the period of permissible picketing *by directing the holding of an expedited election pursuant to the representation petition*." (footnotes omitted, emphasis added.)

As we have seen, from our recitation of the Act, a violation of §8(b)(7)(C) occurs only where picketing has been conducted (for a reasonable time, not to exceed 30 days) without the filing of a petition under §9(c). However, representation petitions under §9(c) lead to representation elections and are filed only by labor organizations who have entered into efforts to organize employees and who seek recognition as their collective bargaining agent. (There is no provision in the scheme of things established by the Act and implemented by the Board for employees to select a representative to bargain for them on one subject, such as subcontracting.) The just recited excerpts from the legislative history and the Board's observations in *Blinne*, with their emphasis on these factors, comport with the view with which we agree, that the sole focus of §8(b)(7)(C) is upon picketing which has as its objective the organization of employees, by a labor organization and recognition of that labor organization as the full collective bargaining agent of those employees, and nothing less than that (*e.g.*, what is stated to be a "recognitional purpose" in *Centralia*

and *Dallas*). Section 8(b)(7)(A), upon which *Dallas* turned, is not tied together with §9(c) certification petitions. The broadened notion of recognitional picketing may comport with the congressional intent vis-à-vis §8(b)(7)(A), so as to prevent the undermining of a duly certified bargaining representative at a time when no question of representation may be raised. It does not comport with the congressional intent vis-à-vis §8(b)(7)(C), for, had Congress meant to proscribe picketing by §8(b)(7)(C) other than for purposes of organization and recognition in the conventional sense, *i.e.*, to organize employees and compel the employer to recognize the union as their bargaining agent, it would not have geared §8(b)(7)(C) violations to failure to file a §9(c) representation petition which leads to a Board supervised election.

Our view as to what type of picketing Congress was concerned with in §8(b)(7)(C) is confirmed by other sources as well. Senator Ervin noted:

> "Recognition picketing is picketing which is designed to *compel the employer to accept the union as the bargaining agent for the employees*, regardless of whether the union represents a majority of the employees." (emphasis added) 105 Cong. Rec. 5960, II 1959 Leg. Hist. 1183.

Professor Archibald Cox, one of the participants in the struggle for the passage of the 1959 amendments, has observed in an article, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L.R. 257 at 265:

> "In both state decisions and NLRB reasoning there has been a tendency to distinguish picketing for recognition from organizational picketing. The Landrum-Griffin amendments wisely ignore the purely verbal distinction and treat them alike. . . ." (footnote omitted).

The view that §8(b)(7)(C) alludes to organization and

recognition in the conventional sense has been accepted by the Board, *see, Pass Development Inc.*, 154 NLRB 169 (1964), and by another learned commentator in addition to Professor Cox, *see*, Van Arkel,[15] *Picketing Under the 1959 Amendments*, Thirteenth Annual New York University Conference on Labor 201 (1960). That view as we have explained it is the first basis of our conclusion that §8(b)(7)(C) is not applicable to the facts of the case at bar, in which the Council does not seek to organize Long's employees to act as their collective bargaining agent.[16]

Further light is also shed on the subject of the type of picketing which is encompassed within §8(b)(7)(C) by a discussion of a controversy over a matter which, for some time, split the Board. The controversy arose in the early Board cases involving area standards picketing, by which a labor organization seeks to compel an employer to confer upon his employees wages and/or work-

15. Gerhard P. Van Arkel, former General Counsel, NLRB.

16. Our conclusion is unaffected by the holding in *NLRB v. Local 142 Int'l Union of Operating Engineers*, 371 F.2d 99 (3d Cir. 1964) in which the court held that picketing of an employer by a union to force the employer to recognize and bargain with the union violated §8(b)(7)(C) even though at the time of the picketing the employer did not employ any operating engineers for the union to represent, so that a §9(c) petition could not be filed. In that case, it appeared that the employer might well in the future resume hiring operating engineers (it was subcontracting that type of work during the period of the litigation), and the Board found that it was for that reason that the union sought recognition. In fact, though the employer had not employed operating engineers since 1957, the union had seen fit to enter into written collective bargaining agreements with the employer until the contract expired. These facts clearly distinguish *Operating Engineers* from the present case where the record supports the Council's conclusion that it is in no position to (and has no intention of) seeking representative status. The court, enforcing the Order of the Board, also reasoned that to allow indefinite picketing in the case which would license a union's use of coercion upon an employer to sign a pre-hire agreement where the majority status of the union could not be established by an election would run contrary to the purpose of the Act.

ing conditions similar to those enjoyed by union members in the area. In *Calumet Contractors Ass'n*, 133 NLRB 512 (1961), the Board held:

> "Respondent's admitted objective to require the Association . . . to conform standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of, recognition or bargaining. A union may legitimately be concerned that a particular employer is undermining area standards. It may be willing to forgo recognition and bargaining provided subnormal working conditions are eliminated from area considerations."

In *Keith Riggs Plumbing and Heating Contractors*, 137 NLRB 1125 at 1126 (1962), the Board observed:

> "A labor union normally seeks to organize the unorganized and to negotiate collective bargaining contracts with employers; but it also has a legitimate interest apart from organization or recognition that employers meet prevailing pay scales and employee benefits, for otherwise employers paying less than the prevailing wage scale would ultimately undermine the area standards. Indeed the importance of maintaining area standards as a matter of public as well as union interest was long ago endorsed by Congress by its enactment of the Davis Bacon Act (40 U.S. Code, Section 276a *et seq.*) relating to public contracts. It has application, of course, whether or not employees of public contractors are organized or have a collective bargaining contract.
>
> "Hence, if a union pickets and says to an employer, 'We only want you to pay the prevailing wage scale, but don't want to bargain with you or organize your employees,' and there is no independent evidence to controvert this statement of objective, the Board cannot find that the picketing has organization, recognition or bargaining objectives. . . ."

Board members Rodgers and Leedom dissented in *Calumet*, in *Keith Riggs*, and in *Houston Building and Construction Trades Council* (Claude Everett Construction Co.), 136 NLRB 321 (1962) (involving standards picketing by a building trades council). They believed that the Board was unduly restricting the definition of organizational and recognitional picketing. Indeed, it has been argued that all labor union picketing has organization as its ultimate, if indirect, purpose. However, neither this philosophy nor that of members Rodgers and Leedom has prevailed. There are cases in which the Board has found coercive action to have a recognitional objective, independent of a purpose to organize and bargain, *see Cartage and Terminal Management Corporation* 130 NLRB 558 (1960), and *Lewis Food Company*, 115 NLRB 890 (1961), but these cases deal with picketing by local unions, not trade councils, who were in position to organize. Moreover, in *Lewis*, an organizational objective was *also* found to be present, while in *Cartage* it was very much present in the background.

Whether or not *Centralia* was incorrectly decided, as the Council contends, because of its failure to permit the picketing which was therein involved to continue as area standards picketing is a matter with which we need not concern ourselves. However, although, as indicated above, *Dallas*' broadened concept of picketing for recogniton may be acceptable for purposes of §8(b)(7)(A), insofar as that decision may be viewed as establishing a rule governing recognitional picketing for §8(b)(7)(C) purposes as well (and we doubt that to have been its intention), we decline to follow it.

Our conclusion that the Council's picketing is not proscribed by §8(b)(7)(C) is buttressed by still another source of authority which is central to this case: §8(e) of the Act. Section 8(e), as interpreted by the courts, carves out from the "hot cargo" provisions of the Act a special rule for the building trades which expressly recognizes the validity of building trades agreements requiring that a

contractor subcontract work only to employers who have executed current agreements with the local craft unions having jurisdiction over the work performed by their employees. *See National Woodwork Mfgrs. Assoc. v. NLRB*, 386 U.S. 612 (1967). The Third Circuit has expressly held that coercive activity, otherwise illegal in other industries, may be employed to obtain a subcontractors agreement. *Essex County District Council v.* NLRB, 332 F.2d 636 (3d Cir. 1964). *See also, NLRB v. Northeastern Indiana Bldg. & Construction Trades Council of Orange County*, 157 NLRB 375 (1966). We believe that a holding which would deny to the Council the right to picket for a subcontract would be at odds with the rationale of *Essex*. At the very least, the presence of §8(e) in the Act casts still more doubt upon the contention that subcontractor picketing is within the parameters of §8(b)(7)(C).

The conclusion that we reach, *i.e.*, that picketing by the Council for a subcontractors agreement is not proscribed by §8(b)(7)(C) is presaged by two decisions of the Board: *Winwake Inc.*, 141 NLRB 38 (1962), and *Pass Development Inc.*, 154 NLRB 169 (1965). These cases principally centered around §8(b)(4) charges against the unions and councils involved because they were attempting to force the general contractor to cease doing business with non-union subcontractors who were on a construction job in progress so as to "correct a non-union condition". However, the auxiliary purpose of the picketing in each case was to persuade the general contractors involved to hire union subcontractors. Thus, while *Winwake* and *Pass* do not involve subcontractor picketing per se, they are generally apposite here. In both cases, the Board squarely held that the councils' actions did not violate §8(b)(7)(C). For reasons indicated above, we are not persuaded by the Board's contention that *Dallas* has rendered *Winwake* and *Pass* obsolete. The Board apparently did not think those decisions to have been superseded when it entered into the stipulation to the effect that subcontractor picketing did not violate §8(b)(7) in the *Office Developers* case.

We have noted (*see* n. 1) that, for the Board to succeed in a §10(l) proceeding, it need not show conclusively the validity of the propositions of law underlying its charge, but only that the propositions of law which it has applied to the charge are substantial and not frivolous. We do not read §10(l), as thus construed, to require a District Court, charged with granting injunctive relief under §10(l) where it is "just and proper", to grant relief based upon legal theories advanced by the Board which while thoughtfully presented and not frivolous, are, in the view of the Court, erroneous.

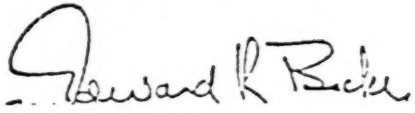
## V. CONCLUSION

It is not for this Court to express a value judgment on the wisdom of permitting building trades councils to picket indefinitely for the purpose of securing a subcontractors agreement from a general contractor in the building industry. Such picketing can wreak major economic havoc upon a contractor and bring a major construction project to a halt—as this picketing has. On the other hand, area standards picketing which has been regularly permitted by the Board and the courts, and even informational picketing, which is permitted by a proviso to §8(b)(7)(C), can have precisely the same effect. It may be that the subcontractor picketing which thwarts the progress of Long and of the new school is an evil in terms of our national labor policy, but, if so, it is for Congress to so declare it and proscribe its use. As we read the Act, Congress has not yet done so. Hence, this Court cannot act in this matter. It is now 13 years since the Landrum-Griffin Amendments to the Act. Perhaps Congress should look again at the matter of picketing in the building trades industry—at the new patterns of picketing which have developed in the interim—and in furtherance of its policy-making role, enact a more comprehensive and consistent set of do's and don'ts on the subject than it has theretofore.

Having found that the Court has jurisdiction over the parties and the subject matter[17] but that there is no reasonable cause to believe that the actions of the Council in engaging in subcontractor picketing constitute a violation of §8(b)(7)(C) of the Act, we conclude that it is not "just and proper", in terms of §10(1) to grant injunctive relief. Accordingly, we enter the following Order.

**ORDER**

AND NOW, this 7th day of July 1972, IT IS ORDERED that petitioner's prayer for a Preliminary Injunction be and it hereby is DENIED and petitioner's petition for an injunction under §10(1) of the National Labor Relations Act is dismissed with prejudice.



EDWARD R. BECKER, J.

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17. The parties have stipulated the essential jurisdictional facts.

# APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1759

BERNARD L. SAMOFF, Regional Director of the Fourth Region of the National Labor Relations Board for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

*Petitioner-Appellant*

*v.*

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY,

*Respondent-Appellee*

(D.C. Civil Action No. 72-634)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 5, 1972

Before VAN DUSEN, GIBBONS and HUNTER,
*Circuit Judges*

Peter G. Nash, General Counsel
Julius G. Serot, Special Counsel
to the General Counsel
Marvin Roth, Supervisory Attorney
Alan Banov, Attorney
National Labor Relations Board
Meranze, Katz, Spear & Bielitsky,
Attorneys for Respondent-Appellee
Shawe & Rosenthal
Warren M. Davison, Attorneys for
Samuel E. Long, Inc.
Amicus Curiae

## OPINION OF THE COURT

(Filed February 27, 1973)

HUNTER, *Circuit Judge*.

This is an appeal from an opinion and order of the district court[1] in which that court declined to issue a preliminary injunction under §10(1)[2] of the Labor Manage-

1. This decision is reported unofficially at 80 LRRM 3358 (E.D. Pa. 1972).

2. Section 10(1) provides as follows:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 8(b) or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. * * *"

ment Relations Act of 1947, as amended 61 Stat. 149; 73 Stat. 544; 29 U.S.C. §160(1). This court has jurisdiction under 28 U.S.C. §1292.

Samuel Long is a non-union contractor, i.e., none of his workers belong to unions. But sub-contracting on his construction jobs is often given to sub-contractors with union labor contracts. Appellee Building and Construction Trades Council is a trade association with area construction unions as members. Appellee decided to picket Long's latest job site, the district court found, solely to force him to employ only subcontractors who use union labor, when and *if* he chooses to sub-contract. He would apparently have a free choice concerning whether to sub-contract. The appearance of the pickets caused a disappearance of all union labor at Long's latest job site, bringing work to a standstill.

Long filed a charge with the National Labor Relations Board, claiming that appellee was engaging in an unfair labor practice prohibited by §8(b)(7)(C)[3] of the Labor Man-

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3. Section 8(b)(7) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents:

* * * * *

"to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act.

"(B) where within the preceding twelve months a valid election under Section 9(c) of this Act has been conducted, or,

"(C) where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of Section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appro-

agement Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §158(b)(7)(C). Pursuant to §10(1), the Board moved for a preliminary injunction against the picketing pending a final decision by the Board[4] as to whether the picketing was in fact an unfair labor practice.

For there to be an unfair labor practice under §8(b)(7), two conditions must be met. First, the introductory clause must be satisfied, i.e., a labor organization must be picketing an employer with an objective of forcing that employer

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Note 3—*Continued*

priate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this Section 8(b)."

4. The merits of this case were decided by the National Labor Relations Board, *see The Building and Construction Trades Council of Philadelphia and Vicinity and Samuel E. Long, Inc.*, 201 N.L.R.B. No. 42 (1973), after this opinion had been written and approved by the panel who sat on the case, but before it was filed. The Board has urged that we declare the matter moot and vacate the judgment of the district court. Appellee argues that the case is not moot, and we agree with it.

As mentioned above, the opinion had already been written and approved before the N.L.R.B. acted. The case had been argued in a complete adversary context, and the opinion was written while the dispute was very much alive. And even if the doctrine of mootness did apply, in appropriate circumstances we can still review §10(1) proceedings because of the problems inherent in perfecting an appeal before the Board's final adjudication. *See Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971), *cert. denied* 403 U.S. 905 (1971), *reh. denied* 404 U.S. 960 (1971). Of course, this opinion has no effect either on the right of the Board to petition for an order of enforcement of its decision pursuant to §10(e) of the Act or the right of the Trades Council to appeal that decision pursuant to §10(f).

to recognize the organization as a representative of his employees. Secondly, one of the conditions in sub-paragraph (A), (B) or (C) also must be met.

Although the Council's purpose was not to represent Long's employees but to force him to accept union sub-contractors, the Board still claims that the introductory clause was violated. The Board reasoned that contracting out of work which might be performed by Long's employees was a term or condition of employment of Long's employees. If, therefore, Long was forced to deal with the Council on the issue of sub-contracting, he would in effect be recognizing the Council as the agent of his employees on that particular issue. This issue is important enough to have a substantial impact on Long's employees. Therefore, it should be sufficient to satisfy the introductory clause. In support of this argument, the board relied heavily upon *Dallas Building & Construction Trades Council v. N.L.R.B.*, 396 F.2d 677 (D.C. Cir. 1968), *enf'g* 164 N.L.R.B. 938 (1967) and also *Lane-Coos-Curry Douglas Counties Building & Construction Trades Council v. N.L.R.B.*, 415 F.2d 656 (9th Cir. 1969), *enf'g* 165 N.L.R.B. 538 (1967). The NLRB felt that sub-contracting was an important issue to Long's employees even though the agreement the Council wanted Long to sign stated only that *when* he sub-contracted, he had to sub-contract with union employers.

The Board then claimed that sub-paragraph (C) of §8(b)(7) was also violated since no petition for an election under §9(C) had been filed and since none of the exceptions to §8(b)(7)(C) had been met.

The district court, after a comprehensive consideration of the legislative history and related case law, determined that the union's picketing did not violate the introductory clause of §8(b)(7). The Court reasoned that read in the context of sub-paragraph (C), the introductory clause means that for picketing to be "recognitional," it must have as a goal the recognition of the bargaining agent (here the Council) as the "full collective bargaining agent of those employees." According to the district court, since the effect

of the proposed agreement at most would be that the Council would be the representative of Long's employees as to only one issue (sub-contracting), the introductory clause would not be violated. After holding that it was not required to issue a preliminary injunction where it disagreed with the legal theory upon which the Board relied, the court denied the Board's motion for that relief.

The Board has appealed from this denial. Its primary contention is that the district court applied an incorrect standard of law in determining when a §10(1) injunction should issue. The Board claims that the district court misinterpreted our decision in *Schauffler v. Local 1291, International Longshoremen's Association*, 292 F.2d 182 (3d Cir. 1961).

In *Schauffler*, this circuit was reviewing the decision of a district court to grant a §10(1) injunction. We said that whether such an injunction should be issued turned on whether there was reasonable cause to believe that an unfair labor practice listed in that section had been committed:

> "The Board need not show that an unfair labor practice has been committed, but need only demonstrate that there is reasonable cause to believe that the elements of an unfair labor practice are present. Nor need the Board conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous." *Schauffler v. Local 1291, supra* at 187.[5]

5. Other circuits have set up similar standards envisioning a limited role for the district courts in these proceedings. *McLeod v. National Maritime Union*, 457 F.2d 1127, 1133 (2d Cir. 1972); *Sachs v. Local Union No. 48, Plumbers*, 454 F.2d 879, 882, 883 (4th Cir. 1972); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 544 (9th Cir. 1969); *Local Joint Board v. Sperry*, 323 F.2d 75, 77-79 (8th Cir. 1963); *Madden v. International Organization of Masters, Mates & Pilots*, 259 F.2d 312, 313-14 (7th Cir. 1958), *cert. denied* 358 U.S. 909 (1958); *American Federation of Radio & Television Artists v. Getreu*, 258 F.2d 698, 699, 701 (6th Cir. 1958).

This test was designed to effectuate the congressional purpose in enacting §10(l).

"The Section 10(l) procedure reflects the congressional determination that certain unfair labor practices are so disruptive that where there is reasonable cause to believe that they are being engaged in their continuance during the pendency of charges before the Board should not be permitted. S.Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 27.[6]

* * *

"If, in a Section 10(l) proceeding, a district court or a court of appeals undertook to finally adjudicate such questions it would not be acting consistently with the congressional policy underlying Section 10(l). That Section's usefulness as a tool with which the status quo may be preserved pending final adjudication would be diminished insofar as the Board would be required to finally litigate questions of substance at a preliminary stage. Moreover, the court would not

6. The Senate Report on the bill that was enacted stated:

"Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes. 'Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices." S. Rep. No. 105, 80th Cong., 1st Sess., pg. 8. 1 Legislative History of the Labor Management Relations Act, 1947, 414.

> have the benefit of the Board's opinion on questions of fact and novel questions of labor law when making its decision. Thus, the court would, to some extent, usurp the Board's function as the primary fact finder in cases arising under the Act and its function as primary interpreter of the statutory scheme." *Schauffler v. Local 1291*, *supra*, 292 F.2d at 187, 188.

The district court noted that *Schauffler* set the applicable standard for determining when a §10(l) injunction should be granted. But it went on to say:

> "We do not read §10(l), as thus construed, to require a District Court, charged with granting injunctive relief under §10(l) where it is 'just and proper,' to grant relief based upon legal theories advanced by the Board, which, *while thoughtfully presented and not frivolous*, are, in the view of the Court erroneous." (Emphasis added).

This is a misinterpretation of *Schauffler*. As dictated by that decision, the district courts have a limited role in §10(l) proceedings. *Schauffler* requires only that the Board's theory be substantial and not frivolous; and if it is, it does not matter whether the district court ultimately agrees with it or not. The Board met its burden here for we feel that the district court's statement that the Board's theory was "thoughtfully presented and not frivolous" can fairly be interpreted to mean that the Board's theory was substantial and not frivolous.

This does not mean that a district court must always grant an injunction even though it disagrees with the Board's legal theory. If the district court can characterize the theory as insubstantial and frivolous, it may refuse the injunction. If the Board's theory cannot be so characterized, however, the district court must grant the injunction since this will best effectuate the congressional policy against disruption of commerce expressed in §10(l).[7]

---

7. See fn. 5. In this case, for example, construction of a school was substantially delayed by the dispute between the parties.

Appellee argues that a motion for a preliminary injunction under §10(j) is addressed to the discretion of the district court and that its decision should not be reversed unless there has been a clear abuse of its discretion. *E.g., Samoff v. Williamsport Building and Construction Trades Council*, 451 F.2d 272, 274 (3d Cir. 1971). It points out that *Schauffler* was an appeal from the grant of a preliminary injunction whereas this case is an appeal from a denial of such an injunction.

Appellee's argument could possibly be successful if we were reviewing the decision of the district court after it had applied the proper legal standard in reaching its decision. As previously mentioned, however, the district court misinterpreted *Schauffler* and thus applied an incorrect standard.

To accept appellee's argument and the district court's decision would circumvent the statutory process of review in these cases. We have no authority to decide these cases finally until the NLRB has acted on them. See §10(e) and §10(f) of the Labor Management Relations Act, *supra*. But if a district court were to determine that the Board's legal theory was incorrect, we would be able to review that determination since it is a question of law. If we made such a review we would be deciding many of these cases on the motion for a preliminary injunction and before the NLRB had a chance to act on them. Adhering to *Schauffler* will guard against premature review.

We emphasize that this decision should in no way be taken as approving or disapproving the ultimate merits of the Board's legal position as advanced in the district court. Presumably, that adjudication will occur pursuant to either §10(e) or §10(f) of the Act.[8]

The decision of the district court will be reversed.

8. See note 4, *supra*.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit.*

# APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 9, 1973

Bernard N. Katz, Esq.
Meranz, Katz, Spear & Wilderman
2100 Lewis Tower Bldg.
Philadelphia, Pa. 19102

RE: Bldg. and Construction Trades Council of Philadelphia and Vicinity v. Samoff, Reg. Dir., etc., et al., 73-6

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of Pennsylvania with directions to dismiss the case as moot.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Helen Taylor, (Mrs.)
Assistant Clerk

Warren M. Davison, Esq.
Shawne & Rosenthal
Sun Life Bldg.
Baltimore, Md. 21201

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-1079

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD
AND
SAMUEL E. LONG, INCORPORATED,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT SAMUEL E. LONG, INCORPORATED, IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1079

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY,

*Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

AND

SAMUEL E. LONG, INCORPORATED,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT SAMUEL E. LONG, INCORPORATED, IN OPPOSITION

### OPINIONS BELOW

The judgment and order of the Court of Appeals are unreported (Pet. A5-5), as is the denial of Petitioner's petition for rehearing (Pet. A7). The decision and order of the

National Labor Relations Board (Pet. A1-4) are reported at 201 NLRB No. 42.[1]

## JURISDICTION

The judgment order of the Court of Appeals was entered on September 19, 1973, and a petition for rehearing was denied on October 11, 1973 (Pet. A5-7). The petition for a writ of certiorari was filed on January 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly found that substantial evidence on the record as a whole supports the Board's finding that the Petitioner had a recognitional object when it picketed Long's job site.

2. Whether the Court of Appeals properly found that a demand for a "subcontractors clause" constituted a demand for recognition within the meaning of Section 8(b)(7)(C) of the National Labor Relations Act, as amended.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages A8-9 of the petition.

## STATEMENT OF FACTS

Respondent Long, a general contractor engaged in the construction industry, was awarded a prime contract in 1971 for the construction of the East Senior High School by the West Chester Area School District, West Chester, Pennsylvania (S.A. 22; A. 61-62, 101).[2] Long's employees are not

---

[1] References designated "A." and "S.A." are to the Appendix and Supplemental Appendix, respectively, filed with the Court of Appeals.

[2] The Board's decision and order, as reprinted in the appendix to the Petition, is incomplete, as it omits the decision of the Administrative Law Judge which was adopted almost totally by the Board (Pet. A1).

represented by any labor organization, and Long has no contracts with any labor organization (S.A. 21; A. 66). As a general contractor, Long performs some of the construction work with his own employees, and the remainder is contracted out to various subcontractors, some of whom are unionized and some of whom are not (S.A. 21-22; A. 66-68, 143). On the East Senior High job, most of Long's contractors were unionized (S.A. 22, n.4; A. 143).

On December 7, 1971, after work had begun on this job, the Council sent Long a letter signed by its attorney, demanding that Long execute a subcontractors agreement pursuant to which Long "would be obliged to subcontract to organizations dealing with craft unions affiliated with the Council" (S.A. 22; A. 137). If Long refused to execute such an agreement, the letter went on, the Council would picket the East Senior High School construction site (*ibid.*). Long refused to execute this agreement and picketing began on January 24, 1972 (S.A. 23; A. 72). The picket sign had the following legend:

> NOTICE
>
> Sam Long Contractor Refuses to enter into a Subcontractors Agreement with the Philadelphia Pennsylvania Building and Construction Trades Council AFL-CIO

(S.A. 23; A. 107). No petition has ever been filed, and it was stipulated that the picketing lasted for considerably longer than 30 days, being in effect at the time of the hearing herein (S.A. 23; A. 72-73). The picketing brought the construction work to a virtual halt because employees of the other prime contractors — for plumbing, heating and electrical work — whose employees were unionized, as well as employees of Long's unionized subcontractors, refused to cross the Council's picket line (S.A. 23; A. 73-74).

On January 24, 1972, the day the picketing began, William Dowler, the Director of Personnel of the West Chester Area School District, and Donald Howland, the School District's Business Manager (A. 12-13, 22), went to the construction site to observe the picketing. There, they met with two union officials, Robert Williams and Charles Boyer (A. 15). During the course of the conversation, Dowler asked what the nature of the picketing was, to which Williams replied, "It is organizational" (Pet. A2; S.A. 16, 23; A. 16, 17, 23). Howland then asked if the pickets were there to organize Long because he was non-union, and Williams replied, "Yes," while Boyer nodded his head in the affirmative (Pet. A2; S.A. 16, 23; A. 17, 23).

At the time of this conversation, Williams, business agent of Elevator Contractors Local No. 5, was a vice-president of the Petitioner Council as well as Local 5's delegate to the Council, while Boyer, a business agent of the Carpenters District Council and a delegate to the Petitioner Council, was chairman of the committee in charge of the pickets at the East Senior High School site (S.A. 17, 25, n.5; A. 30-33).

## PROCEEDING BELOW

The Board concluded, in agreement with its Administrative Law Judge, that the Petitioner violated Section 8(b) (7) (C) by picketing for a recognitional object for more than 30 days without filing a representation petition. The crucial legal determination underlying this conclusion was that a demand for a subcontractors agreement was tantamount to a demand for recognition and, therefore, that the picketing had a recognitional object (S.A. 16, 28-31). Additionally, and without regard to the above, the Board held that the Petitioner's picketing objective was recognitional in view of the statements of Council representatives Williams and Boyer to this effect and, therefore, that the Petitioner was thereby

seeking to force or require Long's employees to accept or select the Council as their bargaining agent, thus violating Section 8(b)(7)(C) of the Act (S.A. 16-18, Pet. A2-3).

On petition for enforcement, in which Long intervened as a party, the Court of Appeals affirmed the Board's findings and conclusions, and enforced its order (Pet. A5-6); the Council's subsequent petition for rehearing was denied (Pet. A7).

## ARGUMENT

It is undisputed that the Council's picketing at the East Senior High School job site lasted for more than 30 days and that no representation petition was ever filed. Thus, two of the three criteria for a violation of Section 8(b)(7)(C) of the Act (Pet. A8) have plainly been met. Only the third — whether an object of the picketing was for recognition or to force or require Long's employees to accept the Council as their bargaining representative — was in issue. The Board found that a recognitional object existed on alternative ground — one factual and one legal — either of which would itself sustain the Board's unfair labor practice determination. Accordingly, no issue warranting Supreme Court review is presented.

1. The statements of Council officials Williams and Boyer, made contemporaneously with the inception of the picketing and directed to two officials of the West Chester Area School District (*supra*, p. 4), clearly affirmed that an object[3] of the picketing was to organize Long because he was non-union. Plainly, Petitioner is bound by the statements of its own responsible officials. *National Labor Rela-*

[3] It is sufficient that *an* object be a proscribed one; it need not be the *only* object. See *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U.S. 675, 688-689 (1951); *International Hod Carriers Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1167 n.28 (1962).

*tions Board v. Brewery and Beer Distributor Drivers, Local 830*, 281 F.2d 319, 322 (C.A. 3, 1960); *National Labor Relations Board v. International Brotherhood of Teamsters, Local 249*, 249 F.2d 292 (C.A. 3, 1957).

On this ground alone the Board could, and did, base a finding that Section 8(b)(7)(C) had been violated (Pet. A3) Petitioner's contrary argument (Petition, pp. 26-28) merely raises an evidentiary issue which plainly does not warrant Supreme Court review. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).

2. Contrary to Petitioner's assertion, the courts of appeals have consistently held that a union demand for a contract clause that restricts an employer from subcontracting to other than union subcontractors is for an object of recognition within the purview of Section 8(b)(7) of the Act. *Dallas Building & Construction Trades Council v. National Labor Relations Board*, 396 F.2d 677 (C.A.D.C., 1968); *Centralia Building & Construction Trades Council v. National Labor Relations Board*, 363 F.2d 699 (C.A.D.C., 1966); *Lane-Coos-Curry-Douglas Counties Building & Construction Trades Council v. National Labor Relations Board*, 415 F.2d 656 (C.A. 9, 1969). There is no conflict among the circuits.[4]

---

[4] The early Board decisions on which Petitioner relies to demonstrate an alleged inconsistency within the Board itself — *Building and Construction Trades Council (Winzeake, Inc.)*, 14 NLRB 38 (1963) and *I.B.E.W., Local 903 (Pass Development, Inc.)*, 154 NLRB 169 (1965) — are not to the contrary. *Winzeake* was litigated on the theory that the union was seeking to organize the employees of the subcontractors, an object that the Board found not to have been factually established (141 NLRB at 39, n.2). And *Pass Development*, unlike this case, did not involve the execution of a continuing agreement between the company and the union, and both the Board and the Court of Appeals in *Dallas* distinguished *Pass Development* on this ground (164 NLRB at 942; 396 F.2d 677).

The "hot cargo" cases upon which Petitioner relies — *Essex County and Vicinity District Council of Carpenters v. National Labor Relations Board*, 332 F.2d 636 (C.A. 3, 1964); *Construction, Production Union Local 383 v. National Labor Relations Board*, 323 F.2d 422 (C.A. 9, 1963); see also cases cited Pet. 11, 19 — are wholly distinguishable. Those cases stand for the proposition that picketing by a bargaining representative for a subcontractors clause is valid under the "construction industry" proviso to Section 8(e) of the Act. The representative status enjoyed by the union in *Essex County* and the other cases is exactly what is missing here, for Petitioner freely admits that it does not represent Long's employees and, indeed, disclaims any intention of seeking to represent them. What *Essex County* and similar cases establish is that a demand for a subcontractors clause may lawfully be made only by the certified or recognized representative of the employer's employees. Picketing for such a clause by Petitioner in the instant case merely demonstrates Petitioner's recognitional object, which is the central holding of this case.

## CONCLUSION

There is, in short, no conflict among the circuits and the instant case presents no issue warranting review by this Court. Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

EARLE K. SHAWE,

WARREN M. DAVISON,

SHAWE & ROSENTHAL,

Attorneys for Respondent
Samuel E. Long, Incorporated.

February 11, 1974.

SUPREME COURT, U. S.

MAR 15 19

MICHAEL RODAK, JR.

No. 73-1079

# In the Supreme Court of the United States

OCTOBER TERM, 1973

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1079

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The court of appeals rendered no opinion. The decision and order of the National Labor Relations Board (Pet. App. A1-A4) [1] are reported at 201 NLRB No. 42.

[1] The petition omits the Administrative Law Judge's decision, which is set forth at S.A. 20-34. "A" and "S.A." refer to the appendix and the supplemental appendix to the briefs in the court below.



534-489—74——1

## JURISDICTION

The judgment of the court of appeals was entered on September 19, 1973 (Pet. App. A5–A6), and the Union's petition for rehearing *en banc* was denied on October 11, 1973 (Pet. App. A7). The petition for a writ of certiorari was filed on January 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Board properly concluded that the Union picketed with a recognitional or organizational objective, in violation of Section 8(b)(7)(C) of the National Labor Relations Act.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A8–A9.

## STATEMENT

Samuel E. Long, Inc., a general contractor in the building and construction industry, does not recognize or have a collective-bargaining agreement with any labor organization (S.A. 21; A. 66). Long's regular complement of about 50 employees, who have no "craft" classifications, normally performs certain types of work on a construction project (*e.g.*, excavation work, structural steel work and concrete work). Long normally subcontracts some of the other work (*e.g.*, boilermaking work, electrical work and elevator work.) The remaining work may be performed by Long's own employees

or by subcontractors, depending on the size of the job (S.A. 21; A. 65–70, 75–77).

In May 1971, Long began construction on a high school in West Chester, Pennsylvania, assigning some of the work to its own employees and subcontracting the rest; 12 of the subcontractors recognized unions and 8 did not (S.A. 22; A. 62, 64–67, 72). On December 7, 1971, petitioner Council wrote Long that it would picket the school construction site if it did not sign the Council's subcontractors agreement[2] (Pet. App. A16–A17; S.A. 22; A. 42–43, 137). Long did not reply to the letter (S.A. 23). On January 24, 1972, the Council commenced picketing at the school construction site with signs bearing the following legend (Pet. App. A17; S.A. 23; A. 72):

> *Sam Long* Contractor Refuses to enter into a Sub-Contractors Agreement with the Philadelphia, Pennsylvania Building & Construction Trades Council, AFL–CIO

The picketing was supervised by Robert Williams, a Council vice-president, and Charles Boyer, chairman of its Delaware County Committee (S.A. 23; A. 17, 30–33). On the Council's instructions, Williams and

---

[2] Such an agreement would have obligated Long to subcontract only to contractors having collective-bargaining agreements "with a member union of the Council who is the recognized collective bargaining agent of the particular trade" (S.A. 27; A. 138). The agreement would have been effective from year to year unless either party gave 90 days' written notice of its desire to change any of the terms. It would have required that Long post a list of its subcontractors on each job, and that disputes under the agreement be arbitrated by an arbitrator empowered to award compensatory and "deterrent" damages (A. 138–140).

Boyer met with three school officials to ask them to erect a sign directing construction workers to the construction entrance, so that there would be no disruption of the activities of the adjacent junior high school (S.A. 23, 25; A. 20–22). During the meeting, one of the school officials asked Williams why the Council was picketing. Williams replied, "It is organizational" (Pet. App. A2; S.A. 23, 24; A. 13–17, 23). Another school official asked if they were there to organize Long because he is "non-union." Williams replied, "Yes," and Boyer nodded his head affirmatively (Pet. App. A2; A. 17–19, 23).

The picketing continued for more than 30 days, without any representation petition being filed under Section 9(c) of the Act, 29 U.S.C. 159(c) (S.A. 23–24; A. 72–73).

The Board found that the Council violated Section 8(b)(7)(C) of the Act by picketing with a recognitional objective since "subcontractor's agreements such as proposed by Respondent [Council] do relate to, and substantially affect, the terms and conditions of employment of the employees of the general contractor from whom the agreement is sought * * *" (S.A. 29). The Board also found that the picketing additionally violated Section 8(b)(7)(C) because the uncontradicted statements of Williams and Boyer showed that the Council "had a further object of forcing or requiring * * * [Long's] employees to accept or select * * * [the Union] as their bargaining representative * * *" (Pet. App. A3). The Board entered an appropriate order (Pet. App. A3–A4), which the court of appeals enforced (Pet. App. A5–A6).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of other courts of appeals.

1. Section 8(b)(7) of the National Labor Relations Act, 29 U.S.C. 158(b)(7), makes it an unfair labor practice for a labor organization or its agents to picket any employer where:

> an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative * * *.
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing * * *.

The basic question presented by the petition is whether the Board properly concluded that the Council, in picketing Long for an agreement restricting his ability to contract out work which his employees could perform, had an objective of forcing or requiring Long "to recognize or bargain with" the Council, within the meaning of Section 8(b)(7)(C).[3] The court below correctly concluded that it did.

[3] In any event, the Council's picketing would still violate Section 8(b)(7) because of the Board's alternative finding, which is supported by substantial evidence (*infra*, pp. 8–9), that the Council was seeking to organize Long because he was "non-union".

In Section 8(b)(7), Congress outlawed any picketing which is intended "to establish a continuing contractual relationship with the employer with regard to matters which could substantially affect the working conditions of his employees, and which are the proper subject of bargaining by a lawfully recognized exclusive representative of those employees." *Lane-Coos Building & Construction Trades Council* v. *National Labor Relations Board*, 415 F. 2d 656, 658–659 (C.A. 9); accord, *Dallas Building & Construction Trades Council* v. *National Labor Relations Board*, 396 F. 2d 677, 680–681 (C.A.D.C.). The subcontractors agreement which the Council sought to compel Long to sign would have had this effect. Long's employees have a direct interest in the extent to, and the circumstances under, which the work they perform is to be subcontracted. Cf. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203. The agreement would have required Long, at least for one year, to subcontract only to firms having labor agreements with unions affiliated with the Council, to post a list of subcontractors on each job, to "cooperate" with the Council "in every possible way towards furthering the interests of both parties," and to submit all disputes to binding arbitration (A138–A139).

This agreement could affect the job interests of Long's own employees in a number of ways. As the Administrative Law Judge found, the requirement that Long use only subcontractors recognizing unions affiliated with the Council would limit Long's choices in a way

that could affect the opportunities for work of his own men (S.A. 29). Moreover, the right of Long's own men (should they become organized) to bargain on their own with respect to subcontracting is a right which they might—at least—trade for other improvements in wages and working conditions (S.A. 28–29). In seeking so substantially to affect Long's employees' terms and conditions of employment, the Union here had a recognitional objective.

2. Contrary to petitioner's contention (Pet. 8–18), the decision of the court of appeals is not in conflict with those of other courts. The two other courts of appeals which have decided the question have likewise held that picketing for an agreement restricting a general contractor's power to subcontract work has a recognitional objective within the meaning of Section 8(b)(7). *Dallas Building & Construction Trades Council, supra; Lane-Coos Building & Construction Trades Council, supra.*[4]

The decision does not conflict with *Essex County District Council of Carpenters* v. *National Labor Relations Board*, 332 F. 2d 636 (C.A. 3), and related cases (Pet. 9–11) holding that picketing to obtain a subcontracting agreement of the type here involved does

[4] The Council attempts (Pet. 25–26) to distinguish *Dallas* and *Lane-Coos* on the ground that they involved a violation of Section 8(b)(7)(A) (Pet. App. A8), not of Section 8(b)(7)(C). Yet paragraphs (A), (B), and (C) are "subordinate to and controlled by the opening phrases of Section 8(b)(7)." *Int'l Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1159. Thus, if picketing for a subcontractors agreement is recognitional for purposes of Section 8(b)(7)(A), it is recognitional for purposes of Section 8(b)(7)(C).

not violate Section 8(b)(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A). Section 8(b)(4)(A) bars the exertion of economic force for the purpose of compelling an employer "to enter into any agreement which is prohibited by section 8(e)". Since the first proviso to Section 8(e) (Pet. App. A10) exempts "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * *," picketing to obtain such an agreement would not violate Section 8(b)(4)(A). It does not follow, however, that such picketing would not violate other provisions of the Act (see *Dallas Building & Construction Trades Council, supra,* at 682), and, as we have shown, it does in fact violate Section 8(b)(7).

Finally, the Board's decision here is not inconsistent with *Int'l Bro. of Electrical Workers, Local Union No. 903* (*Pass Development*), 154 NLRB 169, or *Building & Construction Trades Council of Metropolitan District* (*Winwake, Inc.*), 141 NLRB 38 (Pet. 15–17). Those cases are "clearly distinguishable not only because the union did not seek to enter any continuing agreement with the employer, but also because the subcontracted work was not also performed by the general contractor's own employees." *Dallas Building & Construction Trades Council, supra,* at 683.

3. Petitioner's contention (Pet. 26–28) that the evidence does not support the Board's further finding that its picketing also had an organizational objective merely

presents an evidentiary issue which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490. In any event, the record amply supports the Board's finding. Williams and Boyer, who were high-ranking officials of the Council and thus "had at least apparent authority to state the purpose of the picketing" (Pet. App. A3), frankly admitted to school authorities that an objective of the picketing was to organize Long (*supra,* pp. 3–4).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

PETER G. NASH,
*General Counsel,*
JOHN S. IRVING,
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PATRICK HARDIN,
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MARCH 1974.

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